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Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio

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EDITED BY THOMAS ERSKINE HOLLAND

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An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions concerning the Same

Wherein are set forth Matters regarding Peace and War between different Princes or Peoples, derived from the Most Eminent Historical Jurists

BY

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VOLUME TWO

THE TRANSLATION

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TO THE READER.

The author of the Elements of Jurisprudence, when setting out to show the foundations of Law and Procedure in accordance with the principle of human community, laid down first the general principles of Law and Procedure for a community in general; secondly the rules of Private and Public Law and Procedure for the communities which subsist between one private person and another, and between private persons and princes. He afterwards composed descriptions of the Law and Procedure of special communities; the Sacred, which is concerned with religion and pious causes; the Military, with military service in war and peace; the Maritime, with navigation and commerce; and the Feudal, with fealty and peace. In the three former he confined himself to the authorities of the Civil Law; for the last, the Feudal Community, he availed himself of the Milanese and Norman bodies of Customary Law. At length, being about to proceed to the explanation of those matters which relate to the community which exists between different princes or peoples, he found it necessary to consult other authors learned in historical law. Of these he considered that Albericus Gentilis and Hugo Grotius should be regarded as his leaders, both men distinguished in every branch of learning, of whom the former weighs his statements in the scales of law, the latter in those of reason. He has also consulted other authors, according to the subject of which he is treating; and after first setting forth certain propositions as to which there is little doubt about the law, he has reduced to the form of questions matters as to which the law appeared to be in controversy. In these he has refrained from deciding any point according to his own opinion, thinking it wiser to follow the practice of the Socratic Academy, which, after adducing cases and principles, and expounding the arguments on one side and the other, left the judgment of the hearers free and unfettered. The work, such as it is, he has composed

under the favor of Divine Providence, in fulfilment of the duties of the office which he has for some time held in the University, for the use of the youthful student, during a period of leisure not in other respects happy; if it prove useful to others without bringing discredit upon himself, his desire will be accomplished.

[Here in the original follows a very imperfect list of *errata*, all the entries in which are now incorporated in the full list of *errata* placed at the end of Vol. I, of this edition.]

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PART I.

SECTION I.

Of Law between Nations and of the Law of Peace.

Law between Nations is the law which is recognized in the community of different princes or peoples who hold sovereign power—that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another, and which is observed by nations at peace and by those at war. Peace is a legal concord between different princes or peoples whereby they live one with another in security; and its law regards Status, Ownership, Duty, and Wrong, among those at peace.

1.

That which natural reason has established among all men is respected by all alike, and is called the Law of Nations, as being a law which all nations recognize, as the jurist Gaius says. In the first place, it is the common element in the law which the peoples of single nations use among themselves; inasmuch as of individual men some are free, others slaves; some things are common, others in private ownership; some persons are held to be bound on their contracts, others on their delicts. Secondly, it is the law which is observed in common between princes or peoples of different nations; since by this law, as a jurist also says, nations are separated, kingdoms founded, commerce instituted, and lastly, wars introduced. Law of the latter kind I choose to describe as "*Jus inter Gentes*" or Law between Nations. Among the Romans it was called by a special name, "*Jus Feciale,*" being handed down from the ancient nation of the Æquicolæ; and the study of this law Cicero called an excellent science, which has to do with the conditions of kings, peoples, and foreign nations, in fact with the whole law of Peace and War. For the College of the Fecials, as Dionysius of Halicarnassus records, was founded by Numa Pompilius and to their charge was intrusted the duty of examining agreements, treaties, wrongs done to allies and others, of advising on the send-

ing of ambassadors, on demanding the restoration of property, on renouncing friendship, and on declaring war, and of duly carrying out the decisions on such questions. The books which were written on this law have perished, but traces of it may be found in the Sacred books, the Pandects, and the Codex Juris Romani, in Greek, Latin, and other writers (whose opinions and testimonies establish what has been received on such questions in accordance with natural reason by the customs of nations); because when many persons at different times and places lay down the same principle, that principle must be referred to a universal cause, which can not be other than either a right conclusion proceeding from the first principles of nature, or some general agreement, of which the former points to the Law of Nature, the latter to the Law of Nations. Furthermore, besides common customs, anything upon which single nations agree with other single nations, for example by compacts, conventions and treaties, must also be deemed to be law between nations, since the solemn promise of a state establishes law, and whole peoples, no less than single persons, are bound by their own consent.

2.

Secondly, this Law between Nations holds between those nations or peoples who hold sovereign power, or a universal and supreme power of deciding questions concerning the community between nations both in peace and in war; because by power of this kind single persons, families, and nations are bound together into one body, so that all are deemed to will and to act together. Many, however, or the majority of men, being outside Sovereignty, and each one having his own will, act not as a people but as single persons, so that there are as many actions as there are persons, and if one in the number has not consented to nor assisted in an act he is not deemed to have done it.

3.

Peace, in the words of Augustine, is " ordered concord," which may be understood as referring to peace in general; its different forms others distinguish more exactly according as the " order " regards superiors or equals. To the former kind belong " moral peace," when a man's affections agree with his domestic duties, or when the members of a family agree with the head or father of the family, and " civil peace " when subjects agree with their prince. Of the latter kind is the concord of neighbor with neighbor, state with state, kingdom with kingdom. The basis and attendant of each form of peace is justice; thus the Royal Prophet says of the blessed age, " Mercy and Truth are met together; Justice and Peace have kissed each other." The fruits of peace are that one lives with another in security, and that each is free to enjoy his own rights without let or hindrance; whence peace is defined by Cicero as

" free tranquillity," and among the deities worshiped at Rome " Quiet " was celebrated after Concord and Peace; and in that golden age which the poets imagined the condition of the whole human race was sung as one of peace, because in those days it was supposed that all men were just and innocent, since, as Arnobius says, if all nations would but heed the peaceful commands of reason, the whole world would dwell in tranquillity. But since men, from a depraved reason and corrupted customs, have become ill-affected one towards another, and those who recognize no superior have none to restrain them, it has come to pass that peace only prevails among those princes or peoples who, abhorring offenses and injuries, have united in a concord agreeing with justice, as it were by some special inclination.

1. Digest, I, 1, 9; I, 1, 5; Dionysius of Halicarnassus, book II; Rosinus, book III, ch. 21; Bodin, book V, last chapter; Gentilis, I, 1; Grotius, Prolegomena. 2. Bodin, I, 1; Hobbes, the Citizen, ch. 6. 3. Conrad Braun, on Seditious persons, I, 2, § 8.

SECTION II.

Of Status among those at Peace.

Status among those at peace is their condition among themselves, and with others; their condition among themselves is that whereby they are subjected to civil government, which may be Paternal, Royal, or Popular; their condition with others is that in virtue of which others are regarded as Friends or Allies.

1.

To community between nations belongs first the status or condition of peoples among themselves, which depends on their organization and rule, and in so far as it is voluntary and acceptable to its subjects may be called " civil government." Such was at first the government of parents, which was derived from the procreation of children and propagation of families, and belonged absolutely to the " pater familias," with a view to the provision of those things which conduced to the well-being of himself and his family. Later, when by the propagation of numerous descendants nations were formed, and power over their descendants belonged to the chiefs—(for under the name of parents are included grandfather, great-grandfather, and all generations of ascendants)—it came to pass that government of this kind was diffused over whole nations; and hence, as in sacred literature those who are chiefs over several families are distinguished by the name of " patriarchs," so in the civil law they are distinguished as " principes familiarum." Theologians record that this form of rule lasted in civil matters from the time of our first parents down to the time of Nimrod, and that in the sacred matters of the Old Testament power remained with the patriarchs or heads of families among their kindred before and after the Flood down to the time of Moses.

2.

Royal Government is the power of one man over a people. At one time this power, which Aristotle calls παμβασιλεία, was absolute, when one man for the common advantage had power to act and command in all things at his pleasure, and was not bound to render account to any; whence he was called αὐτοκράτωρ, or " self-sufficient "; and ἀνυπεύθυνος, that is, " subject to no man's authority "; and he records that such government was modeled on the paternal. Justin too says of it:

" In the beginning of things government over races and nations was in the hands of kings, who were raised to this pinnacle of majesty by no courting of the popular favor, but by their own moderation approved among good citizens; the people were bound by no laws; the will of the princes stood for laws; kingdoms were confined each within its own boundaries."

And of the Roman government the Jurist Pomponius says:

" In the beginning of our state the people at first lived without fixed ordinance or law, and all things were guided by the hand of the kings."

At a later date royal power was in some cases limited by laws, like the government which Aristotle calls " Heroic "; in others it was subject to magistrates, like that of the Spartan kings to the ephors; and in others again it ended with life, as did that of the first Roman kings.

3.

Thirdly, popular government is where a people, free and exempt from the authority of a prince, retains all power in its own hands, as power lay with the Roman people after the kings were driven out; it is either intrusted to a few eminent citizens, who are called " optimates," which form of government is called " aristocracy," or is exercised by all, that is to say by the votes of all the citizens or of a majority, which form is known as " democracy." Finally, princes and peoples in whom government is vested are some of them greater and more powerful and have resources more widely diffused; others lesser and weaker, and have their strength confined within narrower bounds.

4.

Secondly, the status or condition of princes or peoples with others in time of peace is that in virtue of which others are regarded as friends or as allies. For just as we ought, according to a jurist, to receive as friends those private persons with whom on honorable grounds we have ties of familiarity, so between different princes or peoples relations are more familiar with some than with others on the ground of a common origin, nearness of territories, a common language, opportunity of rendering mutual services, and the like; and hence from friendship follow rights of hospitality and of commerce. Thus the jurist Pomponius says that there are nations with whom we have neither friendship nor hospitality; and the Romans were wont to confer rights of hospitality as a favor; thus when their ambassadors, who were carrying the golden bowl to Delphi as a gift to Apollo, had been intercepted by pirates and carried to the Liparæ Islands, where it was the custom to divide the booty taken, and Timasitheus, the chief magistrate for that year, after having entertained the ambassadors as public guests, had escorted them with a guard of ships to Delphi, and thence restored them safe home, the

right of hospitality was conferred on him by a decree of the Senate, and gifts were presented to him by the State. The right of commerce is referred to in the argument of Arco in the assembly of the Ætolians, in favor of establishing friendship with Perseus, King of Macedonia: "Our nearness to Macedonia," said he, "places us in a favorable position for offering and asking the right of commerce; lest by closing our own territories we shut ourselves out from the kingdom of Macedonia." This right Bodin too explains more fully as "the liberty to enter, dwell, and do business in the territory of others, to make bargains and contracts, and to carry on a free trade in certain articles, or in all, between the two countries." As Proculus says, it is when others retain their liberty and the ownership of their property as fully in our country as in their own, and when we have the same privileges in their country.

5.

Again, as between private persons, between members of the same family, for example, and between coheirs, there exists a partnership or alliance binding those who share in the common gain and loss to help one another; so between different princes or peoples there is an even closer bond of alliance, the object of which is to maintain the common security and to avert any danger which may be impending and may concern all of the same kindred, religion, condition, or the like, and in virtue of which they are prepared to combine their forces and to help one another; since, as Hannibal said in the council of Antiochus, "A common advantage is the strongest bond of alliance."

Thus when Philip, King of Macedonia, made war on the Athenians, the Thebans joined them voluntarily; but the Athenians, says Curtius, wearied the whole of Greece with their embassies, thinking that the common enemy ought to be destroyed by the common forces; so too the Campanians, fighting for the Sidicini against the Samnites, said: "We have fought, nominally for the Sidicini, but really for ourselves; for we saw a neighboring people the victim of an impious raid of Samnites, and knew that when our neighbors had been consumed, the fire would pass on to us."

The Romans addressed foreign kings with whom they lived at peace, and who had rendered them conspicuous services, as "friends and allies," as a mark of honor. Thus when they heard of the energy of Ptolemy in the war against Tacfarinas, the revival of the ancient custom, says Tacitus, was demanded of Tiberius, and a senator was sent to present the ivory staff and embroidered toga, the ancient gifts of the Fathers, and to hail him as "King, friend, and ally." But when Vermina, the son of Syphax, who had assisted the Carthaginians, asked the Roman Senate that he might be styled king, ally, and friend, the answer was that his father, without cause, had suddenly become the enemy of the Roman people

instead of their friend and ally, and that Vermina himself had passed his early manhood in a war provoking the Romans, and should therefore rather sue for peace than for the title of king, friend, and ally, an honorable name reserved for those who rendered great services to the Republic.

1. Bodin, I, 4; William Lambard, Archion, or a Commentary on the High Court of Justice in England, ch. 1; Prideaux, Introduction to the History of Monarchy, I; Bucanus, Theological Institutes, or an Analysis of the common topics of the Christian Religion, 42, § 6. 2. Aristotle, Politics, book III, ch. 11; Justin, book I, beginning. 3. Aristotle, Politics, III, 5 and 10; Bodin, II, 1, 2, etc. 4. Arnisaeus, Law of Magistrates, I, 4, § 4; Gentilis, I, 15; III, 8. 5. Curtius, I, etc.

Section III.

Of Ownership among those at Peace.

Ownership among different princes or peoples between whom peace exists, is the right which each of them separately has over things, especially over territories, without prejudice to others, and such right is regarded as either Plenary, or Hereditary, or merely Usufructuary.

1.

To community in time of peace belongs also ownership—that is to say, the right which princes and peoples enjoy over things without injury or loss to others; and such ownership, in movable goods, is acquired generally by the same modes as among private persons. Not very different again are the modes by which immovable things also, such as cities and regions, come into their ownership; which, when government or power is exercised in them over persons, are called territories and kingdoms, and are possessed either in plenary, or hereditary, or merely usufructuary right.

In the first place kingdoms or territories are held in plenary right by whole peoples, and sometimes by princes; thus Strabo records that the island of Cythera, which lies off Tænarus, belonged to Euricles, King of Sparta, in his own private right; and in the same case are places which are acquired by occupation and prescription, or transferred to others by gift and testamentary disposition. There may be occupation of those things which before have belonged to no one; and it was by this mode that Japhet, Shem, and Ham, the sons of Noah, after the Flood obtained for themselves regions, marking them off throughout their lands among their nations, each nation after its families. By the same mode in later ages uncultivated places, islands in the sea, and parts of the sea itself have passed by occupation into several ownership.

Akin to occupation is prescription, when regions which have belonged to some one have been abandoned by him and are acquired by another by long possession; thus, when the king of the Ammonites claimed the lands between Arnon and Jabbok, from the Arabian Desert unto Jordan, Jephthah pleaded possession for three hundred years, and asked the king why he and his forefathers had abandoned it all that time. As to gift, King Solomon gave twenty cities to Hiram, King of the Phœnicians; Agamemnon in Homer promises to give seven cities to Achilles; and King Anaxagoras gave two parts of his kingdom to Melampus.

By testamentary disposition, Abraham determined, if he should die without children, to leave his possessions to Eliezer, his steward; Molossus the bastard succeeded to the kingdom of Epirus by the will of Pyrrhus who had no legitimate children; Mithridates, in Justin, says that Paphlagonia came to his father not by force of arms, but by testamentary adoption; Attalus, King of Asia Minor, and Nicomedes, King of Bithynia, made the Roman people their heir; the parts of Lybia about Cyrene were left to the same people by the will of King Apion, and the kingdom of Egypt became part of the Roman people's dominions by the will of an Alexandrian king.

2.

Secondly, those kingdoms are possessed in hereditary right to which succession gives a right. Such succession is either the more ancient form, in which the next of kin to the last deceased is looked for; or the later form, in which regard is had also to the descendants of the first king. In the former there was a preference on grounds of sex and age; thus Herodotus says: "It is the custom of all peoples that the eldest-born should have the government"; and Justin: "Artabazanus the eldest-born claimed the kingdom by privilege of age," a privilege which both the order of birth and nature herself has established among nations; unless, indeed, the elder should be illegitimate, in which case the Macedonians thought that the kingdom rightly belonged to Demetrius the younger, rather than to Perseus the elder. On the failure of sons, daughters succeeded; thus Justin said that the government of the Medes belonged to a daughter, because Astyages had no male issue; and Cyrus declared that Media was the right of his daughter, because he himself had no legitimate male offspring. But if a deceased king left neither sons nor daughters, a brother was admitted to the succession; thus, when Polydectes, King of the Spartans, had died without children, his brother Lycurgus obtained the kingdom for a time.

Succession in which regard is had also to the descendants of the first king is called "lineal," and passes from the direct line to collaterals; the direct line is the line of children, grandchildren, great-grandchildren, and so on; the collateral line is that of brothers, uncles, paternal and maternal, and so on; and in both cases there may be as many lines as there are persons having descendants. Of these the nearer of kin excludes the more remote; but on failure of the nearer, even the remotest degrees are admitted. This lineal succession is either agnatic, where males only succeed, and transmit the right to males, which is said to be the rule in the French kingdom; or cognatic, where both males and females are admitted, preference being given in any degree firstly to the male sex, and secondly to priority of birth, so that the succession never passes from one line to another on the ground of sex or age; and this form of succession is observed in most other kingdoms of Europe.

The alienation or testamentary disposition of these kingdoms or their parts, so as to prejudice successors and the people without their consent, is not permitted. Thus the English held null and void the delivery of the kingdom which King John had made to Pandulph, the Papal Legate, without consulting the barons; the Scots refused to recognize the English rule which John Balliol had imposed upon them against their will; and Francis the First, King of France, who, in captivity, had promised to cede certain provinces of Burgundy to Charles the Fifth, when the ministers of the viceroy of Naples required him at the moment of his landing to fulfil his promise, replied that he must have the consent thereto of the subjects of Burgundy, whom he determined to consult in assembly.

The same rule applies to testamentary disposition; and so when Philip, King of Macedonia, had it in mind to leave the kingdom to his brother's son Antigonus, excluding Perseus, who had wickedly induced him to put to death his son Demetrius, in order to win the consent of his subjects, he went round the cities of Macedonia and commended Antigonus to the princes; and although Charles the Great and Louis the Good made wills bequeathing their kingdoms, the wills had rather the force of a recommendation to the people than of a true disposition; indeed Ado particularly records of Charles that he wished his will to be confirmed by the Frankish nobles. When Humbert, Prince of Dauphiné, was left childless, he bequeathed the principality after his death to the King of France, on condition that the first-born son of the king should forever be called " the Dauphin "; but the nobles of the kingdom first consented to the disposition, having persuaded him to bestow the principality on the son of the King of France rather than on the Roman Pontiff, to whom he had decided to sell it.

3.

Thirdly, kingdoms are held in merely usufructuary right, which kings hold for the term of life only, and to which, on their decease, others are promoted by the votes of the people, or of those who have power delegated to them by the people. Such was the kingdom of Numa Pompilius, Tullus Hostilius, and the other successors of Romulus, who laid the foundations of the Roman State; and of the emperors who succeeded Augustus Cæsar in the days of Rome's greatness. As such are regarded the German Empire, the kingdoms of Hungary, Bohemia, Poland, Denmark, and Sweden, in all of which, it is said, princes ascend the throne by means of votes, most of them taking an oath on their admission not to depress the condition of their kingdoms, some even to win back provinces which have been alienated. Thus when Frederick the Second sought to win back Sardinia, which the Roman Church had claimed for herself, and the Pope reminded him of the oath which he had

taken to defend the things of the Church, he replied that he had first sworn to win back the things of the Empire, from which Sardinia had been wrongfully wrested; the prior oath was the more binding, and the interests of the Empire, supported, as they were, by the better title, ought to be nearer to his heart than the cause of the Roman Church.

Others, however, seem less mindful of an oath of this kind; as Charles the Fourth, who transferred the kingdom of Arles to the French; Louis of Bavaria, who allowed the Swiss to secede from the Empire; and Rudolph the Hapsburg, who sent his chancellor to Italy to grant freedom and independence from the Empire to any peoples who cared to buy it, on which occasion the Florentines redeemed their freedom for six thousand florins, and the people of Lucca for twelve thousand.

1. Grotius, I, 3, § 12; II, 3, § 7; II, 4, § 2. 2. Grotius, II, 7, §§ 12, 13, etc.; I, 7, § 12; Arnisaeus, III, 1, § 10. 3. Arnisaeus, III, 1, §§ 11, 14, 15.

SECTION IV.

Of Duty between those at Peace.

Duty or courtesy between those at peace is that which ought to be mutually rendered between different princes or peoples between whom peace exists, as for instance, the right of Civil Congress, Embassy, Convention, and Treaty, resting either on good faith alone, or on a solemn oath besides.

I.

1.

Among the duties owing in time of peace between different princes or peoples, one of the most important is the right of civil congress or conference, whereby they themselves or their delegates are enabled to meet one another and treat of affairs with dignity and security.

Dignity is marked in many ways. Thus, in the first place, when powerful princes come to a conference, other princes or illustrious persons proceed to meet them, for this form of courtesy indicates both friendship and respect. So Polybius records the magnificent decrees of the Athenian people on the meeting and reception of Attalus; the Roman Senate sent envoys with orders to proceed as far as possible to meet Galba, who was coming from Spain to Rome, as far indeed as Narbona, in order to bid him a cordial welcome in the name of the Republic, and to beg him to accede to the desire of all that he should march with all speed to the City; Cyrus proceeded to meet his uncle Cyaxares, attended by the horseman of four nations; and Theodosius, when Athanasius had been driven out by the Germans, met him at a great distance from the city of Constantinople.

2.

In the second place dignity is marked by the inferior approaching the superior. When Perseus, son of Philip, King of Macedonia, had come to a conference with the Roman Consul Martius; " a river separating the two " (the words are Livy's), " some delay was caused by an interchange of messages as to who should be the first to cross it. The envoys of the king urged the respect due to the royal majesty, those of the Romans that due to the name of Rome, more especially as it was Perseus who had sought the conference; finally Martius (whose own

name was Philip) put an end to the delay by saying in jest, "Let the younger cross to the elder, the son to the father," words which upheld the majesty of Rome under the cover of personal courtesy; and the king readily agreed to this course."

So Artabanus, King of the Parthians, almost the only monarch who had not graced a Roman triumph, respected the power of Rome so highly that he sent envoys to Germanicus, by whom, besides offering a treaty and friendship, he announced that as a mark of respect he would come to Germanicus on the bank of the Euphrates; and Sleidanus records that on the same principle Francis the First, King of France, allowed the emperor Charles the Fifth to be the first to arrive at the Dead Waters, the place appointed for their conference; and it was this that caused the reply of Ariovistus to Cæsar's ambassadors to be regarded as an arrogant one, when he said that if he had needed anything from Cæsar, he would have gone to Cæsar, but that if Cæsar wanted anything from him, let Cæsar come to him.

Akin to this is the rule that an inferior meeting a superior should as a mark of respect be the first to dismount from his horse; thus Tiridates, King of Armenia, when he arrived at the place appointed for the conference between himself and Corbulo, leaped first from his horse at sight of Corbulo. But when Crassus, after his disaster, had dismounted, and was walking up to Surenas, and Surenas seeing him said mockingly, "What is this? does the Roman general go afoot, and we sit on horseback?" Crassus answered, under constraint but with dignity, "Neither does wrong, each meets the other in the manner of his country," for the Parthian, as Tacitus says, relies on his cavalry, the Roman on the columns of his infantry. The same rule is observed in entertaining at a banquet; for when Caius Cæsar, sent by Augustus into Syria, met the King of the Parthians, the Parthian first attended a banquet with the Roman on the Roman bank, and afterwards the Roman attended a banquet with the king on the enemy's bank.

3.

In the third place it is a rule that, as a mark of dignity, the inferior at a congress should first address the superior; and so, when Antigonus proposed that Eumenes should address himself as the superior, Eumenes angrily replied, "I count no man my superior, so long as I am master of a sword." When the consul Titus Quintius, as Livy relates, came to a conference with Philip, King of Macedonia, he, at the king's request, began to speak; which shows that the king, in begging the consul to speak first, recognized that it was his own duty, as the inferior, to have done so. And Sulla, at a congress between himself and Mithridates, expressly told the king that it was a suppliant's part to speak first, a victor's part to hear his prayers in silence.

4.

Moreover, at congresses and conferences leave should be given to provide for security, lest either the number of attendants or the convenience of the place should afford an opportunity for treachery. Thus, when Perseus had determined to cross the river to Martius, another dispute arose, says Livy, as to the number who should cross with him; the king proposed to cross with all his cavalry; the ambassadors of Martius urged that he should come either with three attendants only or, if he brought so large a troop, that he should give hostages to secure that there should be no treachery at the conference; and the King gave as hostages Hippias and Pantaucus, the chief men among his friends; but Livy says that the hostages were given not so much as a pledge of good faith, as to make it apparent to the allies that the king in no way met the ambassadors on terms of equal dignity.

To avoid an ambush suggested by the convenience of the place, one side sometimes holds the conference from a ship; thus when Philip, King of Macedonia, and Titus Quintius, the Roman consul, came to a conference on the coast near Nicæa, the Roman, as Livy records, advanced to the edge of the shore, and when the king came forward to the bows of a ship riding at anchor, said " We might speak and listen to one another more conveniently at close quarters, if you would disembark "; and when the king refused to do so, Quintius added, " Whom, pray, do you fear? " To which the king with royal courage replied, " I fear none save the immortal gods; but I do not trust the faith of all those whom I see around you, and least of all the Ætolians," among whom was their commander Phaneas. " The risk of treachery," said the Roman, " is the same for all who meet in a conference." " True," replied the king, " but in this case the reward of treachery, Philip or Phaneas, is not the same; for the Ætolians will find it easier to provide another commander than the Macedonians a king in my stead."

Of the congress between Edward the Fourth, King of England, and Louis the Eleventh, King of France, Comines writes that when a convenient spot for the conference was required, the French king sent himself and Boccage, and the English sent Howard and Chaloner, with a herald to look for one; having carefully examined all the region and bank of the river Somme, they fixed on the town of Pecquigni, three miles from Amiens, as a suitable spot; and there they decided that a bridge should be erected for the meeting of the kings; in the center of the bridge was placed a grating of moderate height, like that of a lion's cage; the openings between the bars were large enough to allow easily the passage of an arm, and the whole was roofed in above to keep off the rain, so amply, indeed, that twelve men might stand on each side. The grating embraced each side of the bridge, so that no passage was open from one side to the other; on the river was one small boat only, with two oarsmen. Every-

thing being ready for the conference, on the next day both the kings arrived at the place; Louis, first, with eight hundred cuirassiers, Edward with his whole army; but each brought with him twelve men only, and while the kings conversed four of them were appointed on each side to watch what was done on the other side. With the French king were, among others, John, Duke of Bourbon, and his brother the Cardinal; and as soon as Edward arrived at the place, accompanied among others by his brother the Duke of Clarence, the two kings embraced one another very warmly through the gaps in the grating, and Louis, speaking first, said: "Your coming, Cousin, is welcome to me above all things; nay, there is no other prince to-day whose sight and conversation I had rather enjoy; and therefore I render thanks to Almighty God, by whose favor we are met here to confirm an everlasting friendship." Edward having replied to these words in French, his chancellor took up the conversation. And on this wise are the observances which are practised at the congresses of princes and of the representatives of princes.

5.

Lastly, in the congresses and conferences of those who are the representatives of princes, regard must be had to the dignity of those whose persons they sustain. In virtue of this, in the first place, some claim to precede others and to sit in a higher place. Hence Mendoza, the ambassador of the King of Spain at the Council of Trent, being indignant that the highest place among the royal ambassadors was not given to himself, declared that, though he did not claim to precede, yet he could not be compelled to follow, the ambassadors of the French. When Sulla had three seats brought, and gave one to Ariobarzanes, another to Orabazus, the ambassador of Arsaces, King of the Persians, and took the third and center one himself, and then heard Orabazus deliver his message, Arsaces put Orabazus to death on his return, because he had yielded place to Sulla.

In the second place, the order of speaking and the language are governed by the precedence of the persons, the higher in dignity awarding the turns of speaking. Thus in the council of the Ætolians, as Livy relates, although the first place belonged to the majesty of Rome, yet by permission of the Roman ambassadors the Athenians and Macedonians spoke first, the Romans preferring to speak last, so as to be able to reply to the arguments of the others. That to use a nation's own language is a mark of honor, appears from the story which Cicero tells how Verres made it an accusation against him that in a Greek Senate, to wit the Syracusan, he had made a speech in Greek; and of Augustus it is said that though he was ready and fluent in the Greek language, yet he did not use it on all occasions, and in particular refrained from using it in the Senate. He also forbade a soldier, when asked in Greek to give evidence, to answer otherwise than in Latin.

And so when a question of the language to be used arose at a congress of ambassadors of England and Spain, and the ambassador of the Spanish King, feigning to be willing to make a concession to the dignity of Elizabeth, Queen of England, said jokingly to the jurist Dale, her ambassador, "We will treat in French, as your mistress is Queen of France," Dale (whom Bodin somewhere calls a man no less eminent in learning than in honor) replied, as though willing to pay a like honor to the king of Spain "Nay, in Hebrew, if you will, since your master is King of Jerusalem."

But in these cases, it is sometimes deemed wiser, in order to avoid a dispute, to adopt equality or some middle course. Thus Comines relates that at a conference held in the palace of the Duke of Milan, the ambassadors of the Emperor, the King of Spain, and the Princes of Italy were placed on one side, those of the King of France on the other, and the jurist Gannæus was added by the King of France to make the speeches in Latin. Two clerks were also present to commit what was said to writing, one in French, the other in Italian.

6.

As at congresses and conferences, so too in letters and documents between princes, the due measure of honor should be observed according to the dignity of the persons; and hence the omission of any part of a title is regarded as an insult. Thus at the convention of Naumburg, in the year 1561, a letter of Pope Pius the Fifth to Augustus, Elector of Saxony, and the other Protestant princes having been delivered by the hands of ambassadors, with the following inscription: "To our Beloved and Noble Son, Elector, Duke, Landgrave, etc.," the princes, since they thought themselves more than noble, did not deign to unseal or open the letter, but returned it unopened and fastened to the care of the ambassadors, as we learn from De Thou; and when Gustavus Adolphus, King of Sweden, received a reply from the Electors to a former letter of his own, in which the title of king was omitted, he sent them an answer to this effect:

"We have received your reply to our letter of last year; at first sight we could hardly bring ourselves to break the seal, seeing that it did not ascribe to us a title which we and our ancestors have received from God alone, and which for twenty years we have asserted with a strong hand, and are resolved to assert forever, until our last breath; we have, however, opened it on the condition that henceforth our friendship be not broken by insults of this kind."

The Electors afterwards apologized for their conduct in the following terms:

"Most Serene King, although in our letter we omitted a part of your title, we pray your Majesty to be assured that the omission arose not from any spirit of estrangement nor from any desire to detract from

the honor of your Majesty, but from the use and custom which we observe towards all Kings whomsoever."

It is a like breach of etiquette for princes of lower rank to place their names in a letter before those of princes of higher rank. This was pointed out in another letter of the same King of Sweden to the same Electors, in which he intimates that he has received their letter, and recognized from the propriety of the address that it was couched in better form than their previous letter which omitted the title of king; but on opening it, he was not a little surprised to find that, contrary to the established custom and the usual style of electoral letters, not only to himself, but also to other kings, the names of the Electors were placed first, as though with the deliberate intention of slighting his royal dignity and eminence by placing others before his own kingly name; whatever might be the explanation, it was in this sense that he interpreted the incident; and if an error had crept in by the fault of the copyists, and so on.

The rather arrogant letter of Pope Adrian to Frederick the First, confirms this, in which he says:

"We marvel that you do not pay that reverence which you owe to the Blessed Peter and the Holy Roman Church, seeing that in your letter to us you place your name before our own, whereby you incur the reproach of insolence, not to say ignorance."

With this agrees the gloss on the celebrated but suspected law which begins with the words, "Inter Claras" (Code, De Summa Trinitate), the inscription of which runs thus: "To our most Glorious and Merciful son, Justinian Augustus, John Bishop of the City of Rome"; where Accursius has this note, "Formerly the Pope in a letter placed the Emperor's name before his own, which he would not do to-day."

II.

1.

Secondly in time of peace there is between different princes or peoples a right of civil embassy. An embassy, which the Greeks call "ἐκδημος πολιτεία" or external administration, is the management of public business with foreigners by agents. Strictly an embassy should proceed from those who hold supreme power; but in a looser and derivative sense it may be sent out by others, as for instance by colonies, municipalities, or provinces. Of this class are, for the most part, the embassies treated in the titles of the Civil Law "De Legationibus." Moreover in civil disturbances, embassies are said to be sent by one party in the state to another, as by the Plebs (who had seceded to the Aventine) to the Patricians, and by the leaders of a party to those of another, as by Caius Manlius to Martius Rex, and by Brutus and Cassius to Antony and Lepidus, between whom ambassadors are recorded to have passed with messages.

2.

In the second place some embassies may be called *religious,* others *ceremonial,* others *watching,* and others *necessary.*

(1°) They are *religious* when ambassadors are sent to perform some sacred duty, as when, after the defeat at Cannæ, one Fabius Pictor was sent to Delphi by the Romans, to inquire of the oracles by what prayers and supplications they might appease the god; or when Marcus Pompeius Matho and Quintus Catulus were sent to the same place to bring offerings out of the booty taken from Hasdrubal.

(2°) Those embassies are *ceremonial* which, as Tacitus says, are instituted for a ceremonial object; for example, when ambassadors are sent with instructions to offer congratulations, sympathy, and the like; and they are properly so called when accredited by inferiors to superiors. Thus, ceremonial embassies from all quarters of the earth came to Alexander. When sent from equals to equals, however, they are called *honorary,* or instituted for honor. Among them are comprised, firstly, *congratulatory embassies,* such as were those which the Rhodians mentioned in the Roman Senate; "When we," they said, "after the Carthaginians had been conquered, and Philip and Antiochus overthrown, came to Rome to congratulate you, we were escorted from the Senate House to the Capitol, bearing offerings to your gods." So when Perses married the daughter of Seleucus, the nuptials were celebrated by the congratulations and gifts of innumerable ambassadors, and solemnized, as it were, under the auspices of the noblest peoples. Such again are the embassies which princes send to the inauguration of kings, which the Roman Pontiff regards as so surely his due that a Pope, as Guicciardini writes, was indignant with a Catholic king, because he had not, after the custom of his ancestors, sent ambassadors to kiss his feet on his recent creation.

Secondly, embassies are ceremonial or honorary which are *consolatory,* and sent to sympathize in or to testify to sorrow; as when David sent ambassadors to Ammon, King of the Ammonites, to console him after the death of his father; and when the Athenians sent Ctesiphon to Cleopatra, the daughter of Philip, on the decease of Alexander, King of the Molossians. These embassies, unless prompt, are unwelcome; as is shown by the answer of Tiberius to the Trojans; for when they, after the death of Drusus, said that they had come somewhat late to offer him consolation, Tiberius, as though the memory of his sorrow was already obliterated, said, that he too mourned their misfortune in the loss of the noble Hector.

Thirdly, embassies which are designed to demonstrate feelings of friendship belong to this class; as when the ambassador of Chosroes, King of the Persians, presented to Justinian gifts and a letter which simply said that Chosroes desired to be informed of the health of the

emperor; and when Porus, an Indian king, sent a letter by ambassadors to Augustus, in which he declared that, though he was king over six hundred kings himself, yet he sought the friendship of Cæsar, and was ready to allow him free passage wheresoever he might wish, to gratify him by any means in his power, and so on.

These embassies have some particular and definite business for their object, like those other embassies which are sent to seek something which may be of public utility; as when the Decemvirs were sent by the Romans into Greece to seek the laws, which were afterwards reduced to the Twelve Tables; when Publius Gabinius, Marcus Ottacilius, and Lucius Valerius, after the restoration of the capitol, were sent as ambassadors to Erythræ to obtain and bring back the Songs of the Sybil; and when Ptolemy Philadelphus sent to Eleazer the High Priest of the Jews, to inquire into the Jewish law, employing seventy interpreters of the Sacred Books.

(3°) *Ordinary* or *perpetual embassies,* which may also be called *watching,* are those which have no precise or definite business as their object, but are undertaken for a period of time, and the persons who discharge them are commonly called residents; it is their duty, while they remain on embassy, to treat and act in everything which concerns the interests of the sender of the embassy, and to carry out his commands. Many persons believe that such embassies were unknown to the ancients; but they bear some likeness to those which were sent with proconsuls into provinces, and with generals into foreign countries.

(4°) *Extraordinary embassies* are those which are found necessary, according as affairs and business of state require them; and upon them civil conventions, treaties, and the like are discussed.

3.

Sometimes single persons, sometimes more than one, are appointed to undertake embassies, according to the nature of the business, or the rank of those to whom they are sent. The Roman custom was to send a single ambassador, but one of senatorial rank, to address or to recognize kings, and to bear them gifts. Other nations have usually sent more than one ambassador to those more powerful than themselves. Demetrius complained of the Spartans, considering himself slighted that they had sent only one ambassador to him; to which a Spartan replied, " Is not one to one enough? " To Alexander some nations sent a hundred ambassadors; the Sambasti, an Indian nation, fifty, the Scythians twenty, and the Amphictyons in the name of Greece twenty. Tigranes, who was accustomed to receive numerous embassies, said, scorning the fewness of Lucullus' soldiers, " If ambassadors, they are many; if foes, very few." But it has always, among all nations, been the custom that, among several ambassadors, one should be appointed chief of the embassy; thus, in the

embassy of King Philip to Hannibal, Xenophanes was the chief; in that of the Ætolians to the Romans, Phaneas; and in that of the Romans to Greece and Macedonia, Appius Claudius. His duty was publicly to deliver the message, to receive the reply, and with the advice and consent of the others to say whatever was to be said about the business intrusted to them.

Ambassadors are accompanied by a staff and household. The staff consists of persons of gentle condition, chosen by the ambassador himself, as Scipio Æmilianus, when the Senate sent him to the kings, chose his friend Lælius and the philosopher Panætius. Sometimes they are recommended by the sender of the embassy, as Anastasius, a literary man and librarian to the Pope, was added to the staff of his ambassadors by Pope Adrian the Second; and sometimes the staff is made up of persons who are considered likely to be acceptable to the person to whom the embassy is accredited, like the Armenians and Chaldeans who accompanied the ambassador whom Cyrus sent to the King of the Indians. In the household are the free persons and slaves whose services are necessary or useful to the ambassadors.

4.

The authority of ambassadors is derived from *letters of commendation* and *instructions*. *Letters of commendation,* which are commonly called letters of credence, or credit, are documents whereby the senders of embassies inform those to whom the embassies are accredited, that the ambassadors have been sent by themselves, and that they will ratify their acts. An *instruction* is an exposition of the will of the sender of an embassy on the business to be done; and is either *open* or *secret*. The object of an open instruction is that, if necessary, it may be produced to remove a doubt in the minds of those to whom the embassy is sent; and thereby either authority for some definite business is conferred on the ambassador, or absolute authority is intrusted to him, so that he may do anything that the interests of the state seem to require. Thus Phaneas and Damocles were once sent by the Ætolians to the Romans, with absolute authority honestly to determine on any course making for the public welfare; and so Charles, Duke of Burgundy, as Comines relates, gave his ambassadors absolute authority, by signing his name to a blank sheet of paper, to act as might seem expedient, and, if necessary, to show it to Louis the Eleventh, King of France, confirmed by the authority of his signature.

Secret instructions are instructions by which the manner and limits of the ambassadors' power to treat are secretly limited, and sometimes contain orders differing from those contained in their public instructions. Thus ambassadors sent by the Roman Senate under another pretext had in their instructions secret orders to break up the league of the Acheans; Gordian the Elder sent such instructions to Vitalian written on waxen

tablets and sealed up; and Hamilcar, when he was sailing with his fleet to Sicily, gave similar sealed instructions to the captains of his ships, with orders that none should read them unless driven by force of a storm from the course of the flag-ship. The consul Caius Marius conceived a like device in the Cimbrian and Teuton wars, when, in order to test the loyalty of the Gauls and Ligurians, he sent them a letter, the first part of which bade them not to open the latter part, which was sealed, until a certain date; and afterwards, on his demanding it back before the appointed time, and finding it opened, he understood that they were meditating hostility. On this wise then is the constitution of embassies.

5.

The *right of embassy* is that which should be rendered to ambassadors by those to whom they are sent, for instance, in the reception, audience, dismissal, and security to be accorded them. In the reception of ambassadors who come from a more powerful state, it is a usual observance for persons, even of high rank, to meet them on the way as a compliment or honor; thus Antiochus himself went to meet Tiberius the Roman ambassador; when the Emperor Justin, owing to illness, was unable to meet the ambassador of the King of the Persians, the empress went to meet him and received a letter from his hands; Charles the Great sent persons of high rank to receive the ambassadors of Aaron, King of the Persians, as soon as they touched land at Pisa; and such an honor is paid by many kings to the ambassadors of the Roman Pontiff, the kings going to meet them in person; though the King of France usually sends a brother or some prince of the blood to perform this duty.

The reception of ambassadors, further requires that hospitality should be provided befitting their rank, and necessaries supplied to them. At Rome, when the city was still free, a quæstor was usually sent to meet the ambassadors of foreign nations, because, while they remained in the city, their expenses were voted from the public treasury. In accordance with this custom the quæstor Lucius Manlius went to meet Masgaba, the ambassador of Massinissa, and another quæstor met Masicanes, Massinissa's son. The custom is more fully explained in the reception of the kings Prusias and Ptolemy, who came to Rome in the character of ambassadors. When the Senate heard that Prusias, King of Bithynia, was coming to congratulate them after the overthrow of Perseus, they sent the quæstor Publius Cornelius Scipio as far as Capua to meet him, and resolved that the best house obtainable at Rome should be hired for him, and the wants supplied, not only of himself but also of his staff; and when Ptolemy, King of Egypt, after being robbed of his kingdom by his younger brother, came to Rome to ask for help, with a few slaves, and clad in rags, and betook himself to the hospitality of an Alexandrian painter, the Senate, hearing of it, sent for the young man, and made him

the most polite apologies for not having sent a quæstor to meet him according to their ancestral custom, nor having welcomed him with public hospitality; they declared that the omission was not due to carelessness on their own part, but to his own unexpected and secret arrival; and they forthwith escorted him from the Senate House to the public guest-chambers, and bade him doff his rags, and appoint a day of audience with the Senate; and they even made a point of ordering the quæstor to make him daily presents.

In the second place it is customary, at the request of ambassadors, to appoint a council, or a fixed day and place of audience, according to the rank of their persons and the nature of their business. Thus when the Achæans had deluded the ambassadors of the Romans with a long period of waiting, the Senate warned them, lest afterwards they should use excuses to cover their conduct, that Roman ambassadors should always have the right of audience in the council, in the same manner as the Senate was open to them whenever they wished. At Rome the Senate was open for the audiences of provincial embassies from the first of February to the first of March, in order that those who came from great distances might not be long detained; in the reign of Augustus three men of consular rank were appointed to give audience to these embassies; Tiberius gave them audience himself, attended by former governors of the provinces concerned. So too Trajan, of whom Pliny writes: "They are come and gone on the instant, and at length the crowd of embassies is excluded and the emperor's doors are no longer besieged."

Ambassadors were permitted to speak in their own tongue when they were heard in council, and to use the services of an interpreter; thus Cicero says: "Neither Carthaginians, nor Spaniards, nor any foreign nations, spoke in the Roman Senate without an interpreter"; and the Senator Cæcilius was given as interpreter to the three philosophers who came as ambassadors of the Athenians.

Thirdly, ambassadors, having delivered their message, have also a right to an answer. When the chiefs of the Achæans, after hearing the embassies of the Romans, of Attalus, of King Philip, and of the Rhodians, leave being given by the herald according to custom, refused to discuss their demands, Aristhenus, their magistrate, said:

"Chiefs of the Achæans, you lack counsel no more than tongues, but each of you refuses to discuss the matter at his peril. Perchance, were I a private citizen, I, too, should hold my peace; as prætor, I say that either an audience should not have been given to the ambassadors, or they should not be dismissed from it without an answer. But I can give no answer save by your decree."

Sometimes, however, an answer is not given to the members of the embassy, but transmitted through special ambassadors; thus Alexander gave no verbal answer to the ambassadors of Darius, who were sent to

him with a letter, begging for the release of his mother, wife, and children, but bade Thersippus carry a letter to Darius, in which he replied to the king's letter and the ambassadors' demands. Delay in giving an answer to a more powerful state is considered a contempt; thus, when Antiochus consented to receive the ambassadors of the Roman people, Popilius gave him a letter from the Senate to read through; the king read it, and then said that he would summon his friends and consult them, whereupon Popilius, who was a man of rough character, drew a line round the king with a cane which he carried in his hand, and said, " Before you leave this circle give me an answer to take back to the Senate "; and the king, overawed by the violence of the command, said, " I will do what the Senate desires." More excusable was the ruse of the Perugian ambassador, by which he suddenly elicited a reply from Pope Urban V. When the chief of the embassy had wearied the unhappy Pope by an interminable speech in introducing the business, and the Pope inquired whether they had anything else in their instructions, the second ambassador rose and said, " Most Holy Father, we are instructed that unless we forthwith receive an answer, our colleague here should address your Holiness with a speech of much greater length "; hearing which, the Pope immediately gave his answer and dismissed the ambassadors.

Finally, security should be afforded ambassadors by those to whom they are sent, as long as they remain in their territories, because the ambassadors represent the persons of their sovereigns. And not only is security due to the ambassadors themselves, but to their staff, household, and effects as well, for the staff and household are part of the embassy, and an ambassador's goods and chattels should be regarded as attached to his person.

III.

Thirdly, there is due between different princes or peoples a *right of civil convention,* by virtue of which they bind themselves, as do private persons, by contracting about some particular matter; as, for instance, when princes make an agreement with one another about a betrothal or marriage, which they sometimes do through proctors or special ambassadors, this, as Bodin remarks, being more frequently done by princes, who trust in pictures, than by reigning princesses, who prefer to look upon their consorts in person and to address them face to face. Thus Isabella, Queen of Castile, refused to marry Ferdinand until she had seen the prince's countenance; nor, as Bodin also mentions, could Elizabeth, Queen of England, ever be induced to promise her hand to any man whom she had not seen; so that when Henry, King of Sweden, sent a most persistent ambassador in the person of his brother John to ask her in marriage, she replied that she was deeply indebted to the king for having besought her to leave her prison for a throne, but she had resolved to wed no prince but one whom she was first allowed to see.

So, too, when princes bargain about a dowry or about the rights which are to belong to them by reason of a marriage. Thus it was agreed between Philip, King of Spain, and Mary, Queen of England, that, on the celebration of their marriage, Philip should assume the titles of his wife's kingdoms and provinces, and should be her consort in the administration of them, saving the privileges and customs of the realm, and also the full and free conferment of graces, favors, and offices, which was to remain with the Queen. In return, the Queen was to be the consort of her husband Philip in all his kingdoms and, if she should survive him, an annual pension of sixty thousand pounds was to be paid her by way of dowry; moreover, the children of the marriage were to succeed to all the kingdoms and dominions of the Queen, and to all the principalities of the Netherlands and Burgundy held by the Emperor; but Charles, the son of Philip by a former wife, was to inherit all his other kingdoms in Italy and Spain.

So, too, when princes bind themselves for other reasons to pay sums of money or to restore cities, fortresses, or other possessions. When Francis, King of France, was unable to cede to the Spaniards certain dominions, which, when a prisoner, he had promised to cede, because of the protestations of the estates of his realm, it was afterwards agreed by the Peace of Cambray that the Emperor should release the children of the French king who were hostages in Spain, and that the French king should pay to the Emperor two million crowns by way of ransom; and further that he should pay fifteen thousand crowns to Henry the Eighth, King of England, which the Emperor's father Philip had borrowed from Henry the Seventh when driven to England by adverse winds, and so redeem a golden lily studded with gems, in which a piece of Our Lord's cross was believed to be enclosed, which had been pledged to secure the debt, and have it restored to the Emperor.

So, again, when, in the year 1585, it had been agreed between Elizabeth, Queen of England, and the Estates General of the Netherlands, that the Queen should supply the United Provinces with five thousand footmen and a thousand horsemen, and pay their wages during the war, and that meanwhile Flushing, the fortress of Rammekins, and the island of Brill with its town and fortifications should be handed over to the Queen as security, James, King of England, when the debt, amounting to six hundred thousand pounds had been paid, restored the towns, the fortress, and the island with its fortifications, to the Estates of the Netherlands after thirty years.

Successors are bound to respect conventions of this kind, bound by law when the conventions have been entered into in the public interest, and otherwise bound in honor. Thus Francis the Second, King of France, wrote to the Swiss, when they claimed payment of his father's debts, that although he was not bound to pay his father's debts, since he

held the throne of France not by hereditary right but by the law and custom of the realm, which only bound him to observe those treaties or compacts which were contracted by his ancestors with foreign princes and peoples for the welfare and advantage of the kingdom, yet none the less, from a pious concern for the honor of his dear father, he had resolved to pay his just debts.

IV.

Fourthly, the *right of treaty* is that whereby princes or peoples bind themselves for some more general purpose and with greater solemnity; for the definition of a treaty is, as Livy tells us, a contract which binds a whole people by the command of the supreme power; specifically, it is, as Menippus says in Livy, a contract between those who are at peace with one another, in which those who have never been enemies join in friendship by a treaty of alliance. Among the Romans a treaty was usually made by "Fecials," headed by the "Paterpatratus"; and its object is something more general and lasting than that of other public conventions, as, for instance, friendship or alliance, or something which depends on friendship or alliance, such as commerce or assistance. For although friendship or alliance may sometimes exist on grounds of personal or real relationship, yet they are usually strengthened by the closer bond of a treaty or solemn contract; with others, with whom previously they did not exist, they are established; and in either case their limits and conditions are defined; and the assistance which is due under a treaty of alliance is determined more precisely and better than that which belongs to a mere alliance. For some treaties (which are called in Greek ἐπιμαχίαι) relate to alliance and assistance in defense; others (which are called συμμαχίαι) concern both defense and offense.

Further, as to their limits and conditions, treaties are either *equal,* when princes or peoples are under like obligations; or *unequal* when one is bound to do more than the other. Those who are joined in an equal treaty retain the dignity of their sovereignty absolutely unimpaired; of those who are subjected to an unequal treaty, the one is sometimes bound to recognize the other as his superior and to respect his sovereignty readily. Thus a treaty of alliance was concluded with the Ætolians in these words:

"Let the nation of the Ætolians guard the power and majesty of the Roman people without guile; let them have the same enemies as the Roman people, and bear arms against them, and wage wars with the Romans."

V.

Such *public conventions and treaties* sometimes rest on the good faith of the parties, and sometimes a solemn oath is added. Among the Persians to give the right hand was regarded as the strongest bond of

good faith; and this usage appears also to have been practised by the Romans; hence Cicero in the speech " Pro Deiotaro " said that the right hand of Caius Cæsar was as sure in pledging his word as it was in wars and battles. An oath is when God is invoked as witness and avenger; its sanctity has been supreme and from all time and among all peoples it has been of the greatest weight in engagements, promises, and contracts; thus Cicero says, " Our ancestors desired that no bond should be closer than an oath in order to insure good faith."

1. Paschal, chs. 35, 38, 39; Comines, Commentaries; Besold, on Precedence; Nolden, on Nobility, ch. 1, § 6; Lanquet, Epistles, 53; Arlanibaeus, Swedish Arms, pp. 36, 39. 2. Conrad Braun, Albericus Gentilis, Kirchner, Besold, on Embassies, and the authorities by him referred to. 3. Bodin, VI, § 744; Conrad Braun, III, 14; Bodin, I, 8, § 91; 9, § 105; Godwin, Annals, 1585. 4. Bodin, V, 6; Ayala, I, 7; Lupus, on Confederations; Sigonius, on the ancient Law of Italy, ch. 1; Grotius, II, 15. 5. Grotius, III, 13; Bodin, V, 6.

SECTION V.

Of Wrong between those at Peace.

There is a wrong between those at peace when an injury is inflicted on persons, or when property is seized or carried off, or when duties arising by law, or under a convention or treaty, are not performed.

1.

A wrong between different princes or peoples is something by which community or peace is broken, and from which, as lawsuits arise from wrongs and injuries between private persons, so wars arise between those who have no judge. Among these wrongs the first is when status is wounded, or an injury inflicted on persons; and so Germanicus, when insulted by Piso, the proconsul of Syria, renounced his friendship; and Philip thought it a great indignity when the Athenians defiled his statues; and in the same way the Romans thought it a most audacious act when the Ephesians threw down their statues. The wrong is the same when injury is inflicted upon persons with whom we are closely connected; and so Agamemnon and the other princes of Greece made war on the Trojans because of the dishonor of the rape of Helen, the wife of Menelaus.

Moreover, it is also regarded as an injury if something is refused which should be readily granted on the score of humanity or friendship; as a right of passage through territory or rights of commerce; so Augustine maintains that wars were justly waged by the Children of Israel against the Amorites because the right of innocent passage was denied them; and the Greeks, as Plutarch relates, approved the complaint of the Megarians against the Athenians who excluded them from their harbors, contrary to the Common Law. And indeed it is also an injury if violence is offered to allies or help afforded to enemies; and so Quintius said to Nabis, the Tyrant of the Spartans: "You and your friendship and alliance with the Roman people I have not violated; then what things are a violation of friendship? surely these two above all, that you should hold my allies as enemies, and that you should unite with my enemies."

2.

Secondly, between different princes or peoples a wrong is committed when property is carried off or regions or territories occupied; so the Platæans, in Thucydides, say: "It is a law common to all mankind to take vengeance on those who plunder our possessions." And so the Romans harried the Ligurian brigands with war until Postumius had so thoroughly disarmed them that he left scarcely a share to till the ground with.

But the injuries are greater when dominions or kingdoms are invaded; thus Jephthah warred against the Ammonites for the purpose of protecting his territories; and it is recorded that the occasion of the Asiatic War was that the Romans, in accordance with the will of Attalus, had occupied a province which Aristonicus, a scion of the royal house, thinking it to be his right, claimed by force of arms.

3.

Thirdly, there is a wrong in time of peace when the right of conference or embassy is violated, or when the terms of a civil convention or treaty are not observed.

1. The right of conference is infringed by an injury or deception on the occasion of a congress or conference; as when Cornelius Asina, the Roman consul, being invited to meet the general of the Carthaginians in a pretended conference, was overpowered, a proof, says Florus, of Carthaginian perfidy; and when John, Duke of Burgundy, coming to meet Charles the Seventh, King of France, in conference, was murdered by some friends of the Duke of Orleans, who had great influence with Charles; a murder, says Comines, which afterwards led to the greatest calamities.

2. There is a wrong against the right of embassy in the following cases:

(1) If admission is refused to ambassadors; thus, when Hannibal was besieging Saguntum, and the arrival of ambassadors from Rome was reported, he sent men to meet them at the sea and inform them that it would be unsafe for them to come among the arms of so many nations, and for himself he had no mind to listen to embassies at such a critical moment. Hanno eagerly seized on this incident, and bitterly attacked him in the Carthaginian Senate: "Ambassadors," he said, "sent by allies and for allies, your noble general refused to admit into his camp; he has trampled on the Law of Nations; yet though driven from the place whence not even the ambassadors of an enemy are excluded, they come to you." A similar action of Perseus the Senate treated as a declaration of war; Roman ambassadors, sent into Ætolia and Macedonia, were informed by some that Perseus was absent, by others that he was sick, both stories being equally false; and they reported themselves that no opportunity of meeting the king had been afforded them.

(2) If ambassadors are treated with contempt; as when the ambassadors whom David had sent to Hanun, King of the Ammonites, to sympathize with him after the death of his father, were sent away with half of their beards shaved off, and their garments rent to the middle; in consequence of which David pursued Hanun and the Ammonites with bitter war; and when Marius Acilius, the Roman ambassador, was captured by Mithridates and exposed to ridicule; and when the Corinthians showered dirt upon the ambassadors of the same people as they passed.

(3) When haughty answers are returned by inferiors or equals; thus, when ambassadors came from the Romans to Aquilius Gracchus, the commander of the Æqui, to complain of injuries and to demand the restitution of property under a treaty, he bade them deliver the message of the Roman Senate to an oak-tree, for that he had other business to do. An answer of this kind given to Caius Fannius, a Roman ambassador, was the cause of the Dalmatian War, which Scipio carried through; for when Fannius had come to complain of the murder of the ambassadors of some neighboring tribes, the Dalmatians refused to hear him, alleging that they had nothing to do with the Romans.

(4) If ambassadors are beaten; for if one strikes an ambassador, it is deemed an offense against the Law of Nations, says a jurist; and so when the ambassadors of the Laurentines had been struck by the kinsmen of King Tatius, and Tatius himself had not punished them, the crime became his own.

(5) It is a far graver wrong to put an ambassador to death. Accordingly, when Tolumnius, at whose instigation the Roman ambassadors had been killed by the people of Fidenæ, had been conquered in battle by Cornelius Cossus, Cossus attacked him in these words: "Behold the breaker of the treaty of mankind, the violator of the Law of Nations; now will I offer this victim for the sacrifice, if the gods but will that aught should be sacred upon earth, to the shades of the ambassadors." And Leptines, who had killed a Roman ambassador, was sent to Rome by Demetrius with Isocrates, a grammarian, who had instigated the murder. When the Senate sent ambassadors to the Senonian Gauls to complain that they, who were allies of the Roman people, were serving the enemies of the Roman name, Britomaris, a Celt, remembering that his father had been slain when serving among the Roman auxiliaries, cut up the ambassadors into small pieces and had the pieces scattered abroad throughout the fields, a crime which the Romans afterwards avenged on the Gauls with the utmost severity.

Sometimes, however, it is the ambassadors who commit a wrong against those to whom they are sent. Thus,

(1) They sometimes bear themselves in a too insolent manner; so Lucius Annius Setinus, an ambassador sent to Rome by the Latins, spoke in the Roman Senate more like a conqueror who had captured the Capitol by arms than an ambassador protected by the Law of Nations; for which cause the Senate resolved on war against the Latins; and when the Tigurini and the Helvetii sent an embassy to Cæsar to discover whether terms of peace could be agreed on, and Cæsar demanded hostages and money from them, they replied that it was their custom to accept, not to give such terms—insolence that so enraged Cæsar that he at once sent Labienus against the Tigurini and himself moved against the Helvetii.

(2) When ambassadors commit some act of indecency or offend against the law of hospitality; as the ambassadors sent by Megabazus the Persian, to Amyntas, King of Macedonia, who, after obtaining the object for which they had come, were hospitably entertained at a royal banquet; but becoming heated with wine and good cheer, they treated the royal ladies with gross indecency; which so incensed the son of Amyntas that he caused some youths armed with swords and dressed in women's clothes to take the places of the ladies, and when the envoys essayed to treat them with the same freedom, the youths drew their swords and put them to death.

(3) When ambassadors plot the destruction of those to whom they are sent; thus when Pelopidas was trying to bring Thessaly under the power of the Thebans, and thought himself protected by the right of embassy, which all nations usually respected, he was seized by Alexander of Pheræ, together with Ismenias, and thrown into prison; and when Attila, King of Scythia, discovered from many suspicious circumstances that Bigila, the interpreter of the ambassador Maximinus, had been set to murder him, he ordered Bigila's son, who had come with his father on the embassy, to be run through with a sword, if the father did not immediately confess the scheme of treachery; whereupon he, without a moment's delay, discovered the whole plot, and begged the king to release his son, and turn the sword upon himself. Accordingly he was thrown into prison, until a large sum of money, which the son was sent to fetch, was paid to expiate the crime and to buy his freedom.

4.

Fourthly, there is a wrong concerning civil convention when an agreement between princes or peoples is not kept. For instance when the Regent and Peers of Scotland had solemnly promised that the infant Queen Mary should marry Edward the Sixth, King of England, who was still a boy, if both should consent when they came to years of discretion; and afterwards, to oblige the King of France, had betrothed her to the Dauphin, contrary to their pledged word; the Protector of the King, and the Peers of England, being incensed, made war on the Scots and inflicted a severe defeat upon them, many thousands of them being killed in battle and their chief nobles captured, among whom was one Huntly, who, when asked whether he now approved of the proposed marriage of King Edward with Queen Mary, replied that the marriage did not displease him, but he certainly could not approve the means by which it was sought to bring it about.

It is likewise an offense against a convention when falsehood or trickery is used in the matter of promises or obligations; as when the Greeks owed a certain number of ships to the Phœnicians, and gave them ships without rudders, sails, and oars. Comines tells how the Duke of

Milan evaded a promise by a similar piece of trickery; the Duke admitted to him that he had promised to supply a certain number of ships to the King of France by way of aid, but not for him to embark French troops upon them; to which Comines replied that this excuse was as if one should lend a man a mule to cross the Alps, and meantime bid him lead it on foot, and not allow him any other use of it. There is, however, no cause of complaint when those are deceived who trust to a light or ambiguous answer in a grave and serious matter. It was in this way that a French ambassador misled himself and his master; for after the death of Francesco Sforza, he asked the Duchy of Milan, in the name of his king, from the Emperor Charles the Fifth, and the emperor replied that what pleased his brother, the King of France, pleased him. The ambassador, thinking that Charles had by these words signified assent, immediately informed the king to that effect; whereas Charles really meant that the Duchy of Milan pleased him no less than it pleased the French king, and that he intended to show as much zeal in holding it himself as the French king had shown in claiming it.

Finally, there is also a wrong in time of peace when an act is done which is contrary to a civil treaty; as when the state of Caryæ, in the Peloponnese, forgetting the liberties of its country and its sacred treaties, supported the Persian enemy against Greece. The Greeks, after the victory was won, by common consent attacked the people of Caryæ, put the men to the sword, rased the city to the ground, and carried off the women into slavery. And when, during the war with Fidenæ, the Albans, who had been sent under a treaty to help the Romans, waited for the issue of the day midway between the two armies, Tullus Hostilius, who had frustrated the treacherous design by a victory over the enemy, caused Metius, their chief magistrate, the breaker of the treaty, to be bound between two chariots and torn asunder by spirited horses. So, too, Iliturga, a city of Spain and formerly friendly to the Romans, having betrayed to the Carthaginians the remnants of Scipio's army who fled thither as to friends, was stormed by Scipio the Younger and rased to the ground, even the women and children being put to the sword.

5.

Lastly, in these cases the danger of a wrongful act is more serious when faith is violated or the sanctity of an oath disregarded; for it is a serious thing to break faith, the foundation of all justice, whereby not only states are bound together, but all human society; and because perjury is more hateful even than atheism, since perjurers appear to recognize the Deity, but dare to mock Him.

1. Bodin, V, 6; Gentilis, I, 13, and following chapters; Grotius, II, 1, § 5. 2. Florus, II, 3, and 20. 3. Comines, Commentaries, IV; Braun, Paschal, Besold, on Embassies. 4. Hayward, History of Edward VI; Gentilis, II, 4; Comines, Neapolitan War, book IV; Ayrault, Decrees, on Embassies, and on the Lex Julia Majestatis; Bodin, V, 6. 5. Grotius, II, 13; Bodin, V, 6.

SECTION VI.

Of the Law of War.

War is a lawful contention between different princes or peoples, and is either formal, that is, declared and waged by a state; or informal and reprisals, which are practised by private persons. The law of war also regards status, ownership, duty, and wrong between belligerents.

1.

War, like peace, is contained in the Law of Nations. War is a lawful contention, that is, a contention moved by a legitimate authority and for a lawful cause. A legitimate authority is a supreme authority; so Augustine says: "Natural order requires that the authority to undertake a war should be with princes." A lawful cause is an injury which it is allowed both to avenge and to repel; whence a war is said to be either of offense, or of defense; as Camillus in a declaration to the Gauls said, "All things which heaven allows us to defend, it allows us to reclaim and to avenge."

War, again, is either formal or informal. That is formal which, after being duly declared, is waged by a state. Of *declaration,* Cicero in the first book of the "De Officiis" says:

"The equity of war is prescribed in the most binding form by the fecial law of the Roman people; whereby it may be seen that no war is lawful, except one which is preceded by a demand for the restitution of property or by a proclamation and declaration."

Livy thus records the formula of declaration: in the presence of three Romans of full age, the Fecial uttered the following words:

"Whereas the people of the ancient Latins have done and offended against the Roman people, and whereas the Roman people of the Quirites have resolved, agreed, and decreed that war be made on the ancient Latins; now therefore, I and the Roman people hereby declare and make war against the peoples of the ancient Latins."

Having said which, he hurled a spear into the territory of the enemy.

War is waged by a state, when the arms are the property of the state and all citizens are exposed to the dangers of war.

2.

Informal war is that which is undertaken by private persons, and of such war there were among the Ancients two forms, ἀνδροληψία and ἐνεχυρασμός. About ἀνδροληψία, or seizure of persons, the law of Attica was that if a man met death by violence, his kinsmen and friends had a right to seize persons, until either punishment was inflicted for the murder, or the murderers were given up; but three persons only and no more might be seized; which according to Julius Pollux must be understood to refer to cases in which the murderers fled to some other people, and were not given up on demand.

Like this is the custom, in order to recover a citizen who has been imprisoned in an obviously wrongful manner, of detaining citizens of the offending state. And for this reason certain Carthaginians prevented the imprisonment of Aristo the Tyrian, fearing that the same thing might happen to themselves at Tyre and other marts which were frequently visited by Carthaginians.

Ἐνεχυρασμός, or Pignoratio, is when, between different princes or peoples, on account of a denial of justice, a right of seizing goods by public authority is granted to private persons; and this is commonly called reprisals. Justice is held to be denied, not only if judgment can not be obtained against a guilty person, or a debtor, within a reasonable time, but also if in a clear case a judgment is given which is obviously contrary to law, since the authority of the judge has not the same validity against foreigners as against subjects. There is an ancient example of this right in Homer, where Nestor, on account of the theft of his father's horses, is said to have seized the flocks and herds of the people of Elis; and in Roman history in the incident of the Roman ships which Aristodemus, the heir of the Tarquins, detained at Cumæ in revenge for the property of the Tarquins.

1. Ayala and Gentilis, on the Law of War; Belli, on Military Affairs; Grotius, I, 1; II, 22, and 23; Gentilis, III; Grotius, III, 8. 2. Bartolus, de Lodi, Dalner, degli Cani, on Reprisals; Grotius, III, 2, §§ 2, 3, 4, etc.

SECTION VII.

Of Status among Belligerents.

Status among belligerents is their condition among themselves in regard to military government, which is a government either of Military Domination, or Preëminence, or Protection; or their condition in regard to others, which makes them to be regarded either as "Unfriendly persons" or as "Enemies."

1.

Community between nations is concerned not only with civil rule or government, to which peoples voluntarily and of their own accord submit themselves, but also with military government, which is established by force and arms, and by the sight of force and arms. In the first place this government may be one of domination, whereby peoples and nations are reduced to slavery through a victory. Such was the first Asiatic Empire, which Aristotle, who regarded the peoples of Asia as barbarians, calls the barbarian ἀρχὴ δεσποτικὴ, or the rule of masters, to which the inhabitants of Asia, in accordance with their innate customs, submit themselves more readily than Greeks and Europeans. Its origin is referred to Ninus, of whom Justin says:

"In more ancient times, kings waged distant, not neighboring wars, and sought not empire for themselves, but glory for their peoples. First of all Ninus, King of the Assyrians, changed the old, and, as it were, ancestral custom of nations into a new lust of empire; he it was who first made war on neighbors and subjugated the peoples, as yet untrained to resist, as far as the boundaries of Lybia. By continuous possession he confirmed the greatness of the domination which he had won, and when with a fresh accession of force he passed on stronger than before to others, each new victory was the instrument of its successor, until he subdued the peoples of the whole East."

In the Holy Scriptures he is called Nimrod, that is to say, the Terrible Lord, and is distinguished as a most mighty hunter, that is to say, a Robber, because he reduced free men to slavery. Afterwards when Cyrus transferred the monarchy of the whole of Asia from the Assyrians and Medes to the Persians, the right of domination was much relaxed; for Cyrus bade the conquered Assyrians be of good cheer, for that their lot would be the same as it had been, but for the change of king—their homes, and lands, their right over wives and children would remain as

they had always been. Laws were even passed under this empire to bind the princes no less than the peoples. Kings, however, were held in great veneration; so Plutarch relates that when Themistocles wished to meet the King of the Persians after the Greek custom, Artabanus, the captain of the guard, thrust him back and would not suffer him to address the king until he had first performed adoration; but later, when he had left the palace, he addressed him kindly and excused his conduct in these words:

"To every man, Themistocles, the manner of his own nation is admirable; you Greeks have ever embraced liberty and equality; whereas we deem nothing so natural or so becoming as to adore and reverence the majesty of our king, as the image of Almighty God on earth."

2.

Government of preëminence is where conquered peoples are held under the power of a stronger, and in obedience to him, in order that they may not injure him and may serve his interests. Such a government was established by the Greeks and Romans; thus Isocrates advised Philip to subdue the Barbarians just so far as should be sufficient to place his own territory in safety; the Spartans originally, and the Athenians, claimed no government for themselves over captured states, but merely required them to adopt a constitution modeled on their own—the Spartans one under the power of princes, the Athenians one under the will of the people. Agesilaus, as Xenophon relates, exempted all the states which he brought under his own power from the services which slaves perform for masters, and exacted only the obedience of men to rulers. After his victory over Darius, Alexander on several occasions offered him these terms, that he should rule others, but be subject to Alexander.

Of the Romans, Sallust says: "Our ancestors, who were the most devout of men, robbed the vanquished of nothing but the freedom to injure"; and in another passage, "The Roman people thought it better to seek friends than slaves, and safer to rule over willing than over reluctant subjects." And so Quintius, when the Ætolians declared that peace could never be secure unless Philip of Macedon were driven from his kingdom, said that in urging this view they had forgotten the custom of the Romans to spare the conquered; and he added that towards the conquered every great man has a merciful mind. That the Romans allowed conquered kings to govern is testified by Tacitus, who says it was a custom of the Roman People to have even kings as instruments of slavery, and he calls Antiochus the richest of the servile kings.

These, however, were perhaps exceptional cases of clemency. Ordinarily the Senate, on being informed of a victory by a letter from the general who brought the war to an end, empowered the general himself by decree, and either ten or five others chosen from among the Senators,

to organize the conquered territory and people. These persons arranged the states in prefectures, and the territories in provinces, according to their deserts—states which had been ungrateful to the Roman people and had more than once broken their pledged word, when brought under Roman power and control, were reconstituted as prefectures; of which Festus says, that justice was administered in them and markets were held, and in a sense they were free states; but they had no magistrates of their own, and prefects were sent to them by law each year to administer justice. The first prefecture was Collatia, instituted as far back as King Lucius Tarquinius Priscus; and Livy says that, after it had surrendered, it was not received into allegiance with the same clemency as the hostile peoples of Crustumerium and Nomentum, but was deprived of its arms, and fined, and also ordered to receive a prefect and garrison.

Territories were reduced to the form of a province when the laws of the country were abrogated or new ones introduced at will, and a prætor appointed each year by the Roman Senate had charge of the administration and government of the State, with an army in case there should be reason to go to war. In this way first Sicily was formed into a province, then Sardinia, thirdly Cisalpine Gaul, and finally Transalpine Gaul and Britain by Cæsar.

3.

Government of protection or beneficence is that which binds those who have received military fiefs or *benefits* from a prince to render military homage. Such was the government of the Lombards introduced by the northern peoples of Germany, who drove out the former inhabitants and settled in that part of Italy which was called Cisalpine Gaul. They refused to submit to the power of the German emperor, and lived free, and under their own laws; and their princes, keeping for themselves the chief places and those prerogatives which are called royal, granted dignities and estates to persons of warlike aptitude, in return for fealty and military services. Among them the grantor of the fief or *benefit* was called the *patron* or *senior;* those who received it, *vassals.* Some fiefs, which were held by the *greater valvasores,* carried with them dignity and jurisdiction, such as duchies, marquisates, and earldoms; others, which were held by the *lesser valvasores,* carried jurisdiction only; and below these two were simple estates, which were held by *valvasini.* Their system was not unlike that which Lampridius mentions in speaking of the Roman Emperor, Alexander Severus. He granted estates, captured from the enemy, to *frontier* generals and soldiers, on the terms that they should belong to the grantees provided that their heirs rendered military service, saying they would serve the more keenly, if they were also defending their own. This custom the German emperors, after they recovered Italy,

not only retained, but further extended; for Frederick, Conrad, and others, observing that some of the magistrates in the East had usurped the sovereignty of provinces, and others, in the hope of ampler wealth and dignities, had acted in collusion with the enemies of the emperors, granted dignity and rights of administration, and even the revenues of the same provinces, to persons of proved character and their heirs, under the like conditions of fealty and military service. The origin of military homage or service is derived by some writers from the customs of the Germans (from whom the Lombards sprang), of whom Tacitus relates that their princes maintained a vast retinue of followers whom they supported by war, and hired for war. Their chief oath was to guard and defend their prince, to attribute even their own brave deeds to his glory; and they held it lifelong infamy and shame to outlive their prince on the field of battle.

4.

The condition of princes or peoples who are at strife or contention with others is that which causes some to be regarded as *unfriendly persons* and others as *enemies*. Those are *unfriendly* with whom there is no friendship or legal intercourse, as *aliens* and *adversaries*. Aliens were called by the Greeks *barbarians,* and by the Romans *peregrini,* and if injury or damage was done them they had no legal remedy; so that, as regards some of the effects of war, they appeared to be in the position of enemies. Thus a jurist says: "If we have neither friendship, nor rights of hospitality, nor treaty of friendship with a nation, they are not indeed *enemies,* but anything of ours which comes into their hands becomes their property, and the same if anything of theirs comes to us." But we no longer, says Bodin, observe this rule, because we recognize a common humanity between man and man.

Adversaries, again, are those with whom friendship or legal intercourse has existed, but has been dissolved, for example, by civil dissension. Thus Cæsar very frequently calls the Pompeians *adversaries;* and a jurist says of them:

"Civil dissensions, although they do injury to the state, yet do not aim at its destruction, and those who take one side or the other are not enemies, governed by the laws applying to enemies."

5.

Enemies proper are those whom it is lawful to offend and destroy utterly; some of whom are of a worse and others of a better condition. Of the worse condition are those to whom the laws of war do not apply, such as *traitors* and *robbers. Traitors* are those who have taken up arms against their prince or commonwealth with hostile intent, and include *rebels* and *deserters,* who have revolted from the prince to

whose government they were subject. *Robbers* are those who go about in the manner of enemies without the authority of a state, as *brigands* on land, and *pirates* at sea. Those were brigands, who infested the provinces of Cisalpine Gaul, and were harried by Crassus, but they had no leader of sufficient mark, and were neither notorious nor numerous enough in themselves to be called *enemies* of the Roman people. Among pirates were the Cilicians, who, breaking the treaty of the human race and destroying commerce, swept the seas with war, like a tempest, as Florus says, and were first checked by Servilius, and afterwards utterly crushed by Pompey.

Lastly, lawful enemies are those to whom are due all the rights of war; whom Ulpian defines in these words: "Enemies are those against whom the Roman people has decreed war, or who have decreed war against the Roman people"; and Cicero says of them: "An enemy is one who has a State, Senate, Treasury, citizens consenting and agreeing, and some method of making peace or war, if occasion requires."

1. Aristotle, III, 10; Justin, book I, at the beginning; Bodin, II, 2. 2. Grotius, III, 15; Sigonius, Law of Italy, book XII, ch. 11; and book I, last chapter. 3. Hotman, Feudal Terms, 'patronus,' and 'Langobardia'; Treatise on Fees, ch. 1; Tacitus, Germania. 4. Hotman, Famous Questions, 7; Bodin, I, 7, § 69; Gentilis, I, 4. 5. Ayala, I, 2; Grotius, III, 3, § 1.

SECTION VIII.

Of Ownership among Belligerents.

Ownership among belligerents arises when single things and persons are brought under control by capture, or recovered by "postliminium"; and when all the possessions of a people pass into ownership by surrender or victory.

1.

"The Law," says Aristotle, "is a sort of general agreement, whereby things captured in war become the property of the captors"; and the jurist Gaius says: "Things which are captured from enemies immediately become the property of the captors, with the result that even free men are reduced to slavery." But as to persons captured in war, although by the ancient Law of Nations, which permitted them to be put to death, they were reduced to slavery, among Christians it has become the custom merely to detain them until the price of ransom has been paid, at the will of the captor, unless a fixed sum has been agreed upon. Now in war some acquisitions become the property of private persons, others of the prince or people. To private persons belong things which are captured in a private action done on the occasion of a public war, such as spoils stripped from an enemy in single fight and the winnings of soldiers when they are away from the army upon independent and voluntary expeditions; the Italians call this form of booty *correria,* and distinguish it from *butina.* Something similar to this is allowed to sailors on active service; the French call this *pillage* or *spoliation,* and include therein clothes, silver, and gold up to the value of ten crowns. To the prince or people belong things which are captured in a public and general act of war, because in this each man bears the character of the State. So Aristides guarded the booty captured at Marathon; and after the battle at Platæa it was strictly enjoined that no man should take any of the booty for himself. Such booty, however, generals sometimes give up to their soldiers to pillage indiscriminately, and sometimes to divide. Indiscriminate pillage is allowed either in a sack, or after a battle or a storming, the soldiery scattering to the work at a given signal. Thus Tarquin gave Suessa to his soldiery to pillage, the dictator Quintus Servilius the camp of the Æqui, and Camillus the city of Veii. Booty is divided either in proportion to pay or to deserts; Appius Claudius ordered it to be divided in proportion to pay, one share to a foot-soldier, two to a centurion, three

to a horseman. Deserts too were often considered; for instance, for his brave conduct Marcius was rewarded by Postumius out of the booty of Corioli. But whatever the method of division, generals used to reserve some conspicuous object for themselves; thus Livy says of Tarquin, that he wished both to enrich himself and to win the favor of the populace with the booty.

2.

Postliminium, as defined by the jurist Paulus, is the right of recovering something lost from a stranger, and restoring it to its former status, established by customs and laws among the Romans and other free peoples and kings. The right applies to capture by strangers, that is, those with whom open unfriendliness exists, as between the Romans and the Germans and Parthians, or those against whom war has been declared; for among them, says Ulpian, captives become slaves, and when captured from them they recover their former status by postliminium. On the other hand the right has no application to capture by robbers or in civil dissensions, for there the captors are not *enemies,* among whom exist rights of capture and of postliminium. The right extends to persons of every class, but to some things only. Of persons, Paulus says:

"There is postliminium for persons of whatever sex or condition; for not only are those who can fight recovered by postliminium, but also all persons who may be useful either in counsel or in other ways, and even slaves when recaptured by the bravery of soldiers are restored to their masters."

For "we ought to regard them as having been recaptured, not captured, and our soldiers should," say the Emperors, "be their defenders, not their masters." But for deserters, says Paulus, there is no postliminium; for he who leaves his country maliciously and with treacherous intent is to be regarded as an *enemy.* Nor again do those who have surrendered to the enemy after a defeat enjoy postliminium; and, as Pomponius says, "if a captive whose return is provided for in a peace voluntarily remains with the enemy, he loses the right of postliminium." Nor, as Florentinus thought, is a physical return without the intention to remain enough; accordingly an opinion was given that Attilius Regulus, whom the Carthaginians sent to Rome, had not returned by postliminium, because he had sworn to return to Carthage and had not the intention of remaining at Rome. It makes no difference, however, in what manner the captive has returned, whether he was released, or escaped from the power of the enemy by force or by fraud. And, it is enough for postliminium, says Paulus, if without actually entering our territory a man reaches an allied or friendly state or king, because there he first begins to be protected by the name of the state. The effect of postliminium is

that a man recovers not only his status, but, according to Pomponius, on his return all his rights are restored as though he had not been captured by the enemy.

As regards captured things, in the first place immovables, such as lands and estates, are recovered by postliminium; since, as Pomponius says:

"It is true that when the enemy has been expelled from lands which they have occupied, the ownership of those lands reverts to the former owners, nor ought they either to be confiscated or treated as booty."

With this also agrees the rule that sacred or religious places captured by the enemy cease to bear that character, but if released from this calamity their character reverts, as though they were returned by a sort of postliminium.

Secondly, certain movable things also, designed for use in war, are recovered by postliminium: Thus Marcellus says:

"There is postliminium for ships of war and merchant ships because of their use in war, but not for fishing-smacks or light pleasure-boats. A horse too, or a mare, if broken, is recovered by postliminium."

But it is said that arms do not revert by postliminium, because their loss is disgraceful and an offense, and Pomponius says the same is true of clothes.

3.

Further, universal ownership over things and persons, that is to say, over territories and peoples, is acquired by surrender and by victory. A *surrender* is when a people yields to the power of another what otherwise seems likely to be seized by force of arms; thus the peoples of Syria, Mesopotamia, Lybia, and Cilicia yielded themselves and all that they had to Nebuchadnezzar. "All our state," say they, "all our mountains and hills and plains, our herds of cattle, flocks of sheep, goats, horses and camels, all our stores and households are in thy view, let them all be subject to thy law; ourselves too and our sons are thy slaves." So the Falisci addressed the Romans by ambassadors in the Senate: "We are your subjects; send to receive our arms, our hostages, our city with its open gates; you will have no cause to reproach our loyalty, nor we your dominion."

The Campanians, again, made their submission to the Romans in the following words:

"The Campanian people, the city of Capua, our lands, temples and all our possessions, divine and human, we surrender into your hands, Conscript Fathers, and into the hands of the Roman people; henceforth for weal or for woe we are your surrendered subjects."

The effect of a surrender of this kind is, according to Livy, that a superior in arms, to whom everything has been surrendered, may decide

at will what he, as victor, will take, and what the others are to forfeit. A decisive victory is when the enemy suffer a defeat by which an end is put to a war, and as a result of which their cities, lands, and territories pass into the dominion of the victor. So when the envoys of the Volsci, at the instigation of Coriolanus, asked back the cities captured by the Romans, they met with this reply:

"If you had surrenderd your towns to us, and afterwards repenting asked them back, assuredly it would be a wrong that you should not recover them; but as you have been deprived of them by right of war, since you have no longer any dominion over them, you do wrong to seek after what belongs to others. We hold our most legitimate possessions to be those which we have won by our victorious arms; we were not the first to establish this law, and we deem its origin as much divine as human; and as we know that all men, Greeks and barbarians alike, respect it, we will not weakly relax a tittle of it. For it would be a grave offense to lose by cowardice and folly what we have won by bravery and fortitude."

4.

So the Romans by arms and the sight of arms held territories and their peoples in subjection for the benefit of the State, by three titles, *proprietary, subsidiary,* and *dependent.* Territories and their peoples passed into the power of the Roman people by proprietary title when they were received into the dominion of the Roman Empire, and when the peoples of that Empire were transplanted into conquered territories. Of the first method Livy says that Rome grew by admitting her foes to citizenship; and Seneca says: "What to-day had been the Empire if a salutary statesmanship had not mingled the vanquished with the victors?" And Claudius says, in Tacitus: "Our founder Romulus was so exceedingly wise that many peoples were enemies and citizens within a single day." Indeed, after a fierce battle with the Sabines, who had invaded the city on account of the rape of their virgins, a peace was made with their King Tatius, and "there followed," says Florus, "a wonderful thing; leaving their own homes, the enemies migrated to a new city, and shared their ancestral wealth with their daughters' husbands as a dowry." And Tullus Hostilius, after the destruction of Alba, transferred all the wealth of the city, and the people themselves, to Rome, simply, according to Florus, that a kindred state might not appear to have been destroyed, but restored to the body whence it sprang.

So after the utter defeat of the Latins, Camillus gave his advice in the Senate:

"You may establish eternal peace with the Latins, either by wreaking your vengeance upon them or by sparing them. Would you deal cruelly with the surrendered and the vanquished? You may destroy all

Latium, and make vast solitudes of the places whence in many a hard-fought war you have drawn a splendid army of allies. Or would you, after the manner of your fathers, exalt the fortunes of Rome by receiving the vanquished into your state? The means of growing ever more and more glorious are in your hands. Assuredly the strongest of all empires is that which subjects delight to obey." And so on.

To the latter method Gellius refers when he says that colonies are states from the stock of the Roman state; for Romulus, as Dionysius says, neither destroyed nor enslaved the towns which he captured in war, but as a rule sent out colonies from Rome into the territory captured from them; the example of Romulus was followed by the other kings, by the Senate and people after the expulsion of the kings, and by the emperors after the decay of the authority of Senate and people. Sigonius enumerates from the old annals six reasons for this most prudent institution; to hold the former peoples in check, to crush the invasions of enemies, to increase the population, to drain off the urban populace, to avoid sedition, and to bestow rewards on veteran soldiers.

5.

Territories were held by subsidiary right, which were bound to supply a more powerful state with necessaries, such as soldiers, money, corn, and the like. Thus the Romans were able to demand soldiers from those races of Italy with whom they entered into a treaty of peace, as well as from the provinces. Of these Polybius writes as follows:

"Throughout the same period the magistrates of consular rank issued edicts to the governors of the allied states in Italy from whom they thought fit to require help, indicating the number, the day and place of meeting of the levies; and the states, by a similar edict, held a levy and sent forth sworn soldiers, with their appointed commander and paymaster."

An annual tribute of money was imposed on the provinces, of which Petilius Cerialis in Tacitus, speaking for the Romans to the Gauls, said:

"Notwithstanding our many provocations, we have by right of victory laid upon you this burden alone, in order to guard the peace; for there can be no peace without arms, no arms without pay, no pay without tribute."

Lastly, in order to insure the corn supply, the farmers in the provinces were bound to give a tithe of their produce without payment, and to sell what was bought at a price fixed by decree of the senate at Rome.

6.

Free peoples are in subjection by right of *clientship* or dependency, who have bound themselves to loyalty and homage for the sake of protection. Thus when there were two factions in the whole of Gaul,

those of the Ædui and the Arverni, other peoples who adhered to one or the other of these Cæsar calls *clients;* and of the peoples and nations who were *clients* of the Romans, Tacitus says that they had a *reverence* for the Roman empire; and Florus says of them: "Others, too, who were outside the empire, yet felt its greatness and reverenced the Roman people as the world's conquerors."

So when the Campanians were asking protection of the Romans, they said: "None of your colonies will excel ourselves in homage and loyalty towards you; the service which you render us for our safety, we will ever return for your empire and glory." *Clients* differ from *vassals* in this respect, that *vassals* are under the dominion and sovereignty of a supreme lord, whereas princes and peoples who are clients of others, are not under their sovereignty. Thus the jurist Proculus says: "We regard our clients as free, although neither in authority, nor dignity, nor in any of their rights are they our equals."

1. Grotius, III, 6, § 12, etc. 2. Digest, XLIX, 15; Code, VIII, 51. 3. Arnisaeus, I, 3. 4. Grotius, III, 15, § 3; Sigonius, II, 2. 5. Rosinus, X, 4, and 22. 6. Arnisaeus, I, 4, §§ 3, 6, 7.

SECTION IX.

Of Duty between Belligerents.

Duty between belligerents is what we ought to render to those with whom we are at strife or war, as the rights of Military Congress, Embassy, Convention, and Treaty, which are sometimes assured by the giving of hostages or real security.

1.

A *military congress* is when princes or the generals of a war meet in conference or in battle. They meet in conference in the hope that, after reasons on one side and the other have been advanced, the disputes may perhaps be settled. Thus Eumenes and Ptolemy are said to have met in conference; Seleucus and Demetrius met at Orossus, Lucullus and Pompey at Damula; and Cæsar, Antony, and Lepidus, leaving their armies behind them, met at the bridges over the river Lavinius, near the city of Bononia. On their arrival at this spot, after a thorough search had been made of the island which lies there, Lepidus gave the signal with his cloak, and thereupon they entered the island, and leaving three hundred men, together with their friends, at the bridges, they advanced to the center of it and stood in an open field, Cæsar, as imperator, in the middle. Princes meet in battle in order that controversies may be terminated by the issue of victory; and sometimes they themselves engage in single combat; sometimes they decide the issue by an agreed number of soldiers on either side; but most often they submit their quarrels to be determined by contests between the armies.

(1) Of single combat between princes Agathias relates that it was a custom among the Franks, if any quarrels arose between kings, for all to line up in battle array, as though about to decide the issue by war; but when the armies sighted one another, they would suggest to the kings that they should rather fight it out at law, or if they refused, that they should settle the matter by single combat between themselves, and at their own risk only. For it accorded neither with justice nor expediency nor the customs of the country, that they, to gratify their personal enmities, should shake and destroy the interest of the state. So in olden days Hyllus and Echemus contended for the Peloponnese; Hyperochus and Phemius for the district of Inachus; Pyræchma the Ætolian and Degmenus the Epean for Elis; Corbis and Orsua for Ibas.

(2) Sometimes conflicts are waged by an agreed and fixed number of men to decide the causes of the war, with the consent of the princes

and combatants. Thus in the war between the Ætolians and the Eleans two champions met on either side; in the war between the Romans and the Albans, the three Horatii met the three Curiatii, thus, says Florus, abbreviating the war; and in that between the Spartans and the Argives, three hundred fought on either side, with great peril to both parties.

(3) Most often quarrels are decided between larger forces in preliminary skirmishes followed by pitched battles. Thus, when Alexander entered Persia for the first time, and Darius sent part of his army with instructions to chastise and bring to him Philip's mad boy, Alexander attacked them in a position on the steep bank of the Granicus at great risk to his own men, defeated, and overwhelmed them by the valor of the Macedonians. After this he met and fought a pitched battle with the whole army of Darius, both being drawn up in battle array, and a hundred thousand Persian foot-soldiers and ten thousand Persian horsemen were slain; on the side of Alexander, five hundred and four were wounded, and thirty-two foot-soldiers and fifty horsemen only were killed. Then after he had again crossed the Granicus, and Mazæus, the chief general of Darius, had sent forward a thousand horsemen against him, Alexander ordered Ariston, the captain of the Pæonian cavalry, to charge them at full gallop; who, in the course of a notable engagement with the enemy, transfixed Satrapoces, the captain of the Persian cavalry, in the throat with his spear, and pursuing him as he fled through the midst of the enemy, unhorsed him and, as he struggled, cut off his head with his sword, and bringing it back laid it at the feet of the king amidst great applause. Thence Alexander set out with his army against the forces of Darius and fought a battle with them at Arbela, where Darius was put to flight, forty thousand Persians were slain, and less than three hundred Macedonians were missed.

In these *armed congresses* or battles, the more eminent in valor have regard to dignity and honor. Thus, before the battle of Arbela, Parmenio advised that there was need rather of stealth than of battle, that the enemy might be surprised on a stormy night, and, differing as they did in their customs and languages, and terrified by sleep and unexpected danger, how long would it be, he asked, before they could take the field in the midst of a nocturnal panic? Whereas in the daytime there would meet them for the first time the terrible visages of Scythians and Bactrians, their shaggy countenances and unkempt locks, aye and the marvelous size of their huge bodies, and the soldiers would be filled with vain and idle rather than just causes of terror. When practically all agreed with Parmenio, Polyspermon even thinking it certain that victory lay in the adoption of this plan, Alexander said:

" This scheme of yours is the cunning of robbers and thieves, whose sole prayer is to escape discovery; but I will not suffer either the absence of Darius, or the narrowness of the position, or the theft of night, to

take away my glory; I had rather regret my fortune than be ashamed of a victory. Therefore get ye ready for battle."

Regard to honor was shown in the following incident. When the consul Camillus was besieging the Falisci, the master of the games led forth many of the noblest of the Faliscan boys, on pretence of taking a walk, and brought them to the Romans' camp; had they been cut off, it was certain that the Falisci would have laid aside their ardor for the war, and handed themselves over to Roman rule; but the Senate decreed that the master should be bound and the boys sent back to their own country, beating him as they went—an act of justice, which, says Valerius, captured the hearts of those whose walls it was impossible to storm; for the Falisci, conquered by kindness rather than by arms, opened their gates to the Romans. Camillus, says Florus, who was a man full of piety and of wisdom, knew that a true victory could only be won if faith was kept and honor untarnished.

So, too, when Timochares the Ambraciot offered to the consul Fabricius to murder Pyrrhus by poison by the aid of his son who prepared the king's potions, Fabricius reported the matter to the Senate and induced them to send ambassadors to warn Pyrrhus that he should guard himself more carefully against plots of this kind, mindful that the City had been founded by the son of Mars, and that wars ought to be waged by arms and not by poisons.

Seneca too says of him, " Fabricius refused the gold of King Pyrrhus; and, when Pyrrhus' physician offered to poison him, he warned the king to beware of the plot, and was equally resolved not to be conquered by gold, and not to conquer by poison. Hence," says he, " we admired a man who was great indeed, and, most difficult of all, a man innocent in war, and one who would believe a thing to be wrong, even against an enemy."

Following this example, when the prince of the Catti offered to procure the death of Arminius, the most cruel and treacherous enemy of the Romans, if poison were sent him for the murder, the Emperor Tiberius and the Senate replied that they took their vengeance on their enemies, not by secret treachery, but by open arms.

Nevertheless everything in war need not be done by force alone; there are some things in which an honorable guile and cunning may be used. Thus Polybius says that in war acts of force are sometimes less important than what is done from opportunity or deceit.

And Valerius Maximus says: " There is a certain form of cunning which is honorable and free from all blame, the acts of which are called ' strategems '; and these are allowable both in contests between a few champions and in battles between armies."

As to contests between champions, a notable example is mentioned by Florus: When the Romans and Albans, being equal in strength, were

wearing each other down by frequent battles, the fate of both peoples was intrusted to the Horatii and the Curiatii, three brothers on either side. The fight was even and glorious, and in its issue wonderful. For the three Albans being wounded, and two Romans killed, the surviving Horatius, using deceit to aid his bravery, in order to divide the enemy, feigned flight, and attacked and defeated each separately, as opportunity offered.

As to battles between armies, in which as much cunning as force was used, Valerius also gives the following examples; first Hannibal with the Romans, and then the Romans with Hasdrubal and Hannibal. Hannibal, he says, before descending to fight the battle of Cannæ, involved the Roman army in many cunning snares; for he was careful above all things that they should have the sun and the dust (which in that place is raised by the wind in great quantities) in their faces; secondly, he ordered part of his troops, in the very midst of the battle, to make a feint of flight, and when a Roman legion pursued them after they broke from the army, he caused it to be cut to pieces by men whom he had placed in ambush; finally he detached four hundred horsemen, who, feigning desertion, sought the consul, and were bidden, as usual with deserters, to lay down their arms and withdraw to the remotest part of the field; whereupon they drew the swords which they had hidden between their breastplates and tunics, and cut the hamstrings of the Romans as they fought. This, says he, was Carthaginian bravery, dressed out with tricks and ambushes and falsehood, which is now an excuse for our defrauded valor, for we were deceived rather than conquered.

Secondly, he relates how, when Hannibal was tearing one coast of Italy, and Hasdrubal had invaded the other, the junction of the forces of the two brothers, which would have crushed by an intolerable burden the weary fortunes of Rome, was prevented by the energetic counsel of Claudius Nero on the one side and the notable forethought of Livius Salinator on the other. For Nero, having shut up Hannibal in Lucania, deceived the enemy into thinking he still remained (for so the exigencies of war demanded) and set off with wonderful speed on the long march to the assistance of his colleague. Salinator, who was about to fight a battle on the next day near the river Metaurus in Umbria, received Nero into his camp by night with the utmost secrecy. He bade the tribunes receive the tribunes, the centurions the centurions, the horsemen the horsemen, and the footmen the footmen, and thus, without any confusion, introduced a second army on to ground which scarcely held one. Thus it came to pass that Hasdrubal was unaware that he was about to engage the two consuls, until he was routed by both. Thus, says he, Carthaginian cunning, notorious the whole world over, was baffled by Roman forethought; Hannibal fell a victim to the wiles of Nero, and Hasdrubal to those of Salinator.

2.

A *military embassy* is one which is employed to treat of things pertaining to war. Those who ordinarily went on such embassies were called among the Greeks *caduceators,* because they carried a *caduceus* or staff of Mercury, girt with the images of crested snakes; among the Romans they were called *fecials,* and their chief was the *pater-patratus,* one who had both father and children; they bore vervain as an emblem, a herb sacred to Jupiter and also used for the purification of houses. Among the moderns their place has been taken by *heralds,* formal messengers of kings, who are distinguished by an embroidered or parti-colored robe, variegated with the emblems of the princes by whom they are sent. Such messengers are employed to complain of injuries, to demand the restitution of property carried off, to threaten, to declare war, to obtain security for the coming and going of other ambassadors.

Extraordinary and more formal ambassadors are those appointed to treat of a truce, a peace, and their conditions. To such ambassadors the hospitable and kindly attentions paid to civil ambassadors are not shown; persons are sent to meet them on their arrival to forbid their nearer approach, nor are they admitted into city or camp. By ancient custom among the Romans a meeting of the Senate was usually held for the ambassadors of enemies at the temple of Bellona without the city. So Hezekiah excluded the ambassador of Sennacherib from Jerusalem; and the Goths, who were holding Urbino with a garrison, refused to admit the spokesmen of Belisarius into the city. Titus Quintius did not admit the ambassadors of the Bœotians, then enemies, into his camp. Constantius, too, excluded the ambassadors of Magnentius from his camp. Sometimes, however, ambassadors sent by a more powerful state are received with greater courtesy; thus Pyrrhus sent Lyco, a Molossian, to meet the Roman envoys who were making for his camp in order to ransom captives, that they might come thither more safely; and that they might be the more honorably received he himself, with a guard of cavalry, met them outside the gate, not being so elated by his successful fortunes as to neglect respect for men who at that time were his determined enemies in arms.

And those who are not afraid to show their own strength sometimes admit ambassadors into the camp; thus twenty ambassadors of the Scythians rode through the camp of Alexander, were admitted to his tent, and bidden to seat themselves; and Pirozes received Constantine, a Roman ambassador, in his camp, and Tullius Menophilus received ambassadors of the Carpi. The Roman consuls at Utica, when an embassy arrived from the Carthaginians, took their seats on an elevated tribunal, with generals, tribunes, and ranks of legionaries standing on either hand, glittering eagles and standards set up on all sides, that the ambassadors might see the vast number of their forces, and when the

trumpet had proclaimed silence, bade the ambassadors by the herald to approach. The ambassadors then passed through the lines of armed men, came to the place of the tribunal, and there were bidden to declare what they had come to seek. To these ambassadors, however, no less than to those sent in time of peace, security is due. So Cicero says: "An ambassador should be one who, not so much by his staff as by his title of spokesman, is able to pass unscathed amidst the arms of the enemy."

3.

Military or warlike conventions (of which the jurist Ulpian speaks) are when the leaders of a war agree together on certain terms. Leaders of a war are either *supreme,* as the Roman imperators, under whose *auspices* a war was waged; thus Livy says, "we recognize none as the leader of a war except him under whose 'auspices' the war is waged"; or *inferior,* as to which Cæsar says, "An imperator and a legatus have different functions; the one decides freely on the gravest matters, the other acts on instructions."

Leaders of the latter kind may make agreements on matters which concern the administration of the war, when the prince or supreme general is away. Such agreements or conventions relate to (1) safe-conduct, (2) armistice, (3) exchange and ransom of prisoners, (4) terms to be granted to those who surrender besieged places, and the like.

(1) *Safe-conduct* is a license granted during war to single or definite persons to go and return in safety; and security from the soldiers of the party granting it should be shown them not only within the territory, but also elsewhere.

(2) An *armistice* is defined by Paulus as an agreement, for a short and for the present time, that combatants will not attack one another; Varro calls it "the peace of a camp," or "the holiday of war." While it lasts, the combatants must refrain from all warlike acts and must allow each other to go and return without warlike equipment. Thus, when Rome was besieged by Tarquin, and an armistice had been made between Porsena and the Romans during the celebration of the games of the Circus in the City, it is said that the generals of the enemy entered, competed in the curule contest, and were crowned victors.

(3) Conventions are made about the exchange and ransom of prisoners. For although Alexander said, in kingly fashion, "I remember that I am no merchant, but a king; if it please us to return prisoners, it is more honorable to give them as a gift than to release them at a price"; and Pyrrhus promised to return his prisoners for nothing, if peace should be made, but otherwise not at all, for it was unfair to ask him to return prisoners whom the enemy might use against him; yet others have thought it honorable enough and more expedient to offer them for ransom. Thus Hannibal, when certain Roman soldiers had

come into his hands after the battle of Cannæ, fixed the price of ransom for each, for a horseman five hundred quadrigate sesterces, for a footman three hundred, for a slave a hundred; and ten of them he sent to Rome to obtain gold for ransom, having first bound them by oath to return to the enemy, if they failed to obtain it. And when one of these had pleaded their cause in the Senate, and a mournful shout was raised of those who begged the Fathers to restore their children, brothers, or kindred, some proposed that they should be ransomed at the public expense, others privately, others again by a loan from the treasury; but Titus Manlius Torquatus urged that since they had refused to make a sally against the enemy with Publius Sempronius Tuditanus and others who had followed him successfully, they no more deserved to be ransomed than those deserved to be surrendered to Hannibal, who by their great valor had restored themselves to their country. And indeed the Roman State, as Livy shows, from the earliest times showed little indulgence towards prisoners, and on this account Quintus Fabius Maximus, who had made an agreement with the enemy for the ransom of those prisoners who had done the better service, on this agreement being rejected by the Senate, sold his own estate for two hundred thousand sesterces and so redeemed his pledge.

(4) As dominions and territories, to prevent their being forcibly seized, are sometimes handed over to the control of others by an unconditional surrender, so fortresses, towns, and places defended by garrisons, are surrendered to the enemy on terms previously agreed, to avoid the evils attending a storm; and if they throw themselves on the honor of a general, before being threatened by extreme danger, they obtain better terms. Thus Cæsar announced to the Aduatici that he would preserve their city if they surrendered before the battering-ram struck the wall. In other cases the besieged stipulate that they may depart with their goods, or in safety, or with their arms, or be escorted to a certain place, which terms, if a surrender takes place, should be observed in every particular. And so when Marcus Fulvius was accused of having plundered Ambracia contrary to the terms of its surrender, and he contended that the city had not been surrendered but captured, because it was attacked with mound and penthouses, and because the fight had raged on the walls and under the ground for fifteen days, the Senate decreed that all its property should be restored to a city which had opened its gates to Fulvius, because terms had been agreed on.

4.

Military or warlike treaties are concluded by the authority of the persons who have the supreme power, either for a prolonged armistice, which is commonly called a truce, or for a perpetual peace. For though an armistice is often agreed upon for a short time, from necessity or some immediate occasion, yet sometimes it is granted for a longer time,

as when the Romans granted the people of Veii an armistice for a hundred years, then for forty, finally for twenty: an armistice of this kind is as good as a peace, and its violation involves greater danger. A treaty or compact of peace is an agreement for perpetual cessation from armed force, at least if the essence of a peace is that it should be perpetual, and it is so in the formula, " Let there be peace between the Roman and the Latin peoples so long as heaven and earth remain." Such a treaty, as we find in the threefold division of Menippus, is either when parties who are equal in war join in peace and friendship by an equal treaty: or is when terms are imposed on the vanquished, and in this the victor decides what the vanquished is to have and what he is to forfeit. The former, however, is a treaty in the strict sense, when two belligerents who have the power of deciding on war, make an agreement for the settlement of a war, and in which questions of remitting, or making reparation for offenses, of fixing boundaries, of commerce, and the like are dealt with; but such treaties are most enduring when, as Tullus warned the general of the Albans, attention is directed not so much to securing present friendship as to leaving no excuse for a renewal of war in the future. The other may be less strictly called a treaty or compact of peace, when after a victory the victors alone determine the conditions of the future peace; as when the Carthaginians, vanquished and broken after the first Punic war, were compelled to submit to conditions offered by the Romans, to wit, that they should evacuate Sicily and all the islands between Italy and Africa, pay 2,200 Eubœan talents for twenty years, restore the Roman prisoners without ransom, and that the allies of each people should enjoy security in the territory of the other.

5.

Treaties or compacts of this kind, as being contracted with higher authority, are sometimes confirmed by hostages who are given to secure the good faith of the state; and sometimes even fortresses and cities are handed over as a security. But when a peace is granted to the vanquished, greater precautions are taken; thus Livy records that it was an ancient custom of the Romans not to govern those to whom they were united by a treaty of unequal terms, as though the latter were completely subdued, until they had surrendered all their possessions, sacred and profane, hostages had been received, arms taken away, and garrisons quartered in the country.

1. Paschal, ch. 28; Grotius, II, 23, § 10; III, 20, § 43; Gentilis, III, 15; Curtius, I, 2, 3, and 4; Florus, I, 12; Valerius Maximus, VI; Florus, I, 3; Valerius Maximus, VII; Frontinus, on Stratagems. 2. Braun; Ayala, ch. 9; Gentilis, on Embassies, I, 6; Paschal, ch. 42. 3. Gentilis, III, 14; II, 10, 11; Grotius, III, 19, 30, and 21; Polybius, VI; Grotius, III, 20, § 49. 4. Grotius, III, 19 and 20; Gentilis, III, 1 and 13; Besold, on Peace and the Law of Peace. 5. Ayrault, Judgments, on public agreements, ch. 5; Gentilis, II, 19; Grotius, III, 20, § 52.

SECTION X.

Of Wrong between Belligerents.

There is a wrong between belligerents (1) when war is unjustly begun; (2) when the right of military congress or embassy is violated; (3) when military conventions and treaties are not observed; (4) when a victor exceeds moderation in following up his victory.

1.

War is begun unjustly when there is no cause for war; as when men rush into war, as Tacitus says, being greedy of danger for its own sake; or when the cause is unjust, as when war is undertaken from a desire for a change of territory, for instance, to leave swamps and wildernesses and possess a more fertile land, which, as Tacitus also says, was a cause of war among the ancient Germans; or when the cause is frivolous, as was that which Bodin refers to, when the Scots, because some dogs were stolen, commenced a most deadly war against the Picts with whom they had been on terms of peace and friendship for about six hundred years. Again war is begun unjustly when a declaration or proclamation of war is omitted: thus Aristides said that Philip, King of Macedonia, did not use heralds, so as to be able to crush his enemies unawares.

2.

The right of military congress is violated:

(1) When an ambush is prepared under the appearance of a conference; thus Attalus and the Roman envoys were led into danger when Prusias, King of Bithynia, brought his whole army to a conference instead of the thousand horsemen whom he had agreed to bring.

(2) When there is fraudulent and treacherous conduct; thus, when Albert, Count of Franconia, was besieged in the strongest fortress of the city of Bamberg by the Emperor Louis, whose son he was accused of having put to death, Otho, the Archbishop of Mainz, who volunteered to settle the dispute, swore to Albert that if he would go with him to the emperor he would either obtain peace or bring him back to his fortress; Albert, nothing doubting, followed him, and they had hardly left the fortress before Otho begged him to return to the fortress to dine, for fear that there might be something of a delay at the emperor's. They accordingly returned, and setting forth again after dinner came to Louis, where Albert was immediately seized and condemned to death. He

appealed to the Archbishop's word, to which the priest replied that he had kept his word, for he had brought him back safe once, and had not promised to bring him back twice. Not very different from this is what Dercilidas and Paches are said to have done: they promised the besieged a return to their city if they would come to them, and, when they came, threatened them with death if they did not surrender it, and finally allowed them to return to the city, when it had been surrendered.

(3) When the enemy are cheated by lies; thus when Lucius Martius and Attalus, who had been sent as ambassadors into Greece to King Philip, boasted on their return that they had deceived the king by an armistice and by the hope of a peace, and when a great part of the Senate approved, the old men, says Livy, remembering the ancient ways, disapproved of this new wisdom, and recalled that their ancestors had waged wars, not by trickery but by true valor. Again in an "armed congress" or battle it is considered an unworthy thing when, as Cicero says, what ought to be achieved by valor is attempted by a bribe, for instance, an attempt to corrupt subjects against their prince or country. And so blame has been laid on Philip, who openly practised that art and was accustomed to declare that he had found no stronghold so well fortified that it would not immediately open its gates at the approach of an ass laden with gold; wherefore he was called the purchaser rather than the conqueror of Greece.

It is an offense against the right of military embassy if violence or injury is offered to the ambassadors of the enemy: and therefore one who struck or injured an ambassador of the enemy was generally surrendered to the enemy. So in the consulship of Marcus Æmilius Lepidus and Caius Flaminius, Lucius Minutius and Lucius Manlius, having laid hands on the Carthaginian ambassadors, were surrendered to the Carthaginians by the fecials by the order of Marcus Claudius, the urban prætor, and conveyed to Carthage; and when Quintus Fabius and Cnæus Sempronius, the ædiles, struck ambassadors who had been sent from Apollonia to Rome, the Senate immediately surrendered them, by the fecials, to the ambassadors.

3.

Thirdly, there is an offense against military conventions:

(1) When persons are molested to whom a safe-conduct has been granted; it was in regard to this that Alexander's honor was impugned, when he ordered men whom he had allowed to depart, to be killed on their journey.

(2) When fraud is practised in the matter of an armistice, as by the Thracians, who, having agreed to an armistice of thirty days with the Thessalians, ravaged their territory by night, saying that they had agreed to an armistice of so many days, not nights.

(3) When fraud is used in the restoration of persons and things, as when the Platæans who had agreed to restore prisoners, put them to death first, and then restored them; and when the Romans, after binding themselves to restore to Antiochus the half of his ships, cut all the ships in two, and left him the half of each one.

(4) Another violation is when faith is not kept in a matter of ransom, as by the man who with ten others was sent to Rome by Hannibal, under oath to return to his camp if they failed to obtain the amount of their ransom; after starting he returned to the camp pretending to have forgotten something, and then followed his companions; and when the others, having failed in their object, returned to Hannibal, he went away home, on the plea that he had acquitted himself of his oath by his false return to the camp; but when the Senate learned of it they ordered him to be arrested and sent back to Hannibal in public custody.

(5) Lastly, when the terms of surrender are not observed; as when Saladin, who had agreed to liberal terms on the surrender of Ascalon, because he thought it was defended by a strong garrison, on finding that it was almost empty of soldiers, refused to adhere to those terms, on the plea that he had been deceived.

There is an offense against military treaties, when the terms of an armistice or a peace are broken. The people of Veii were destroyed root and branch with all their towns by the Romans because they had begun war against the Romans in breach of an armistice. And when the gallant general Hunyadi, after concluding peace with the king of the Turks, at the exhortation of the cardinal legate of the council, who was displeased with the agreement, renewed the war, this treachery roused the Turks to such fury, that they attacked the Christians on all sides with an enormous army and utterly routed them; and though the Emperor Sigismund had collected a countless host at Nicopolis, he was none the less crushed in a signal disaster, and the legate of the council was killed by robbers.

4.

Lastly a wrong is committed in war when victors, who can act at will, exceed moderation in following up their victory. For example:

(1) When they show no mercy to suppliants and to those who surrender—persons whom, as Giovio says, the laws both of humanity and of warfare are said to pardon; and Sallust in his Jugurthine history, having recorded that grown men were put to death after surrendering, remarks that this was a violation of the law of war.

(2) When women and children are put to death; as Thucydides says the Thracians did at the capture of Mycalessus, and Arrian the Macedonians at the capture of Thebes. Alexander, however, said, "I do not wage war with women"; and as to children, Camillus said, "We

do not bear arms against an age which is spared, even at the capture of cities."

(3) When burial is denied to the enemy's dead; a right which Appian calls the common right of war, and Philo the "commerce" of war. Thus Hannibal sought out the Romans Caius Flaminius, Publius Æmilius, and Tiberius Gracchus, to bury them, and the same respect was shown to Hanno by the Romans, to Mithridates by Pompey, and to King Archelaus by Antony: and Suidas says that it was a great disgrace to Lysander that he did not allow slain enemies to be interred. Isocrates too says that when the Thebans refused burial to their Argive foes, Theseus and the Athenians made war against them on that account.

(4) When sacred places and tombs are profaned: thus Philip, says Florus, exceeded a victor's rights by his destruction of temples, altars, and even tombs.

1. Grotius, II, 1, 22, and 23; Ayala, I, 12; Gentilis, I, 7, etc.; II, 1; Curtius. 2. Paschal, chs. 38, 39; Volateranus, History of Franconia; Braun, IV, 23; Paschal, chs. 25, 26; Besold, ch. 5. 3. Gentilis, II, 4; Florus, I, 12; Bodin, V, 6. 4. Gentilis, II, 16, 17, etc.; Grotius, III, 4, 5, 11, and 12.

PART II.

SECTION I.

Of Procedure between Nations and of Questions of Peace.

Procedure between nations is the means whereby disputes between themselves or their subjects are decided: (1) when they have fixed judges; (2) when they agree to refer to arbitrators; (3) when they submit to judgment by the law of the place; (4) when jurists pronounce censure on them.

1.

Besides the procedure of war, by whose doubtful and costly issue disputes between sovereign princes, and peoples are commonly settled, neighboring peoples, however free, sometimes have fixed judges to decide their quarrels. Thus among the Amphictyons (seven famous cities of Greece who drew into alliance with them nearly all the others) there were judges called Myrii, who, at conventions at which representatives of all the cities were usually present, decided the questions and disputes arising between the members; and so great was the authority of this tribunal that the gods themselves are said to have referred their feuds to the Amphictyons. And in Gaul Cæsar records that conventions of this kind were held, for, though the Ædui, Carnutes, Arverni, and Bellocassi had separate aristocratic governments, yet the differences of all were settled by the decrees and judgments of the Druids.

2.

Sometimes peoples between whom existed a dispute and contention agreed to refer it to the arbitration of others. Thus Adrastus and Amphiaraus submitted to the judgment of Eriphyle in the matter of the Argive kingdom; the people of Ardea and Aricia argued their case before the Roman people, the King of Numidia and the Carthaginians before the Roman Senate, the Parthians and Armenians before arbitrators appointed by Pompey.

3.

Thirdly the subjects of foreign princes and peoples sometimes accept trial before the ordinary judges of the place in which the dispute arises. Thus Antonius Gamma tells how the French and Castilians submitted to judgment in Portugal on a question of booty taken in a naval war. And the Spanish orations of Albericus Gentilis show that the Spaniards and Dutch and other foreign peoples often went to law on maritime questions in the Court of Admiralty of England.

4.

Fourthly, judgment is pronounced by doctors and jurists on the deeds of princes and peoples, which affects their reputation and credit. So, when Elizabeth, Queen of England, was considering whether to put Mary Queen of Scots to death after her condemnation, one reason among others, says Camden, against taking away her life was the fear of discredit among historians of the future. On causes and problems of this kind many volumes of disputations and decisions have been written, to justify and condemn the past and perhaps to direct the future. And to such judgments the following questions about peace and war have reference.

1. Bodin, I, 7, § 74. 2. Grotius, II, 23, § 8. 3. Gamma, Decisions, 384. 4. Camden, Annals, 1587.

1. Whether we may have peace with all men?

Nature, says the jurist Pomponius, has established a kind of kinship between all men. Now by the rights of kinship men are bound to help and benefit one another, much more (as peace requires) to abstain from injuring one another; and the human race naturally seeks after the blessing of peace, says Augustine, because in this mortal life there can be nothing more pleasant and useful. Aristotle, however, says that certain men, that is, barbarians, are made to be slaves, and that war against them is the same as hunting wild beasts. And Philip, King of Macedon, says in Livy that the Greeks wage eternal war with all foreigners and barbarians; for they are enemies by nature, which is unchanging, and not for reasons which change from day to day. Nevertheless man is not naturally repugnant to man; it is custom that leads them to agreement or disagreement.

Gentilis, I, 12; Grotius, II, 20, § 40.

2. Whether peace or war is at times the more disadvantageous?

Hannibal, after his return from Italy to Africa, said: "No great state can remain at peace; if it has no enemies abroad, it finds them at home." And after the end of the third Punic War, when Cato had declared that Carthage must be destroyed, Scipio Nasica, says Florus,

urged that it should be preserved, lest when fear of the rival city was removed, the prosperity of Rome should lead to degeneracy. And so Cyrus, after his conquest of the Lydians, took away their arms and horses and ordered them to follow the trade of shopkeepers and other base trades; so that a race, once powerful through industry and strength of hand, became effeminate through self-indulgence and luxury, and lost its former qualities; and men whom, before Cyrus' day, war had shown to be invincible, sank into luxury and were overcome by idleness and sloth.

Livy, book XXX; Florus, II, 15; Justin, book I.

3. Whether an unrighteous peace is to be preferred to a righteous war?

Marcus Lepidus, while commander in Transalpine Gaul, sent messengers to the Senate and recommended that peace should be made with Antony, to avoid the mischiefs of civil war. Some of the senators supported this view, but Cicero dissented saying:

"The name of peace is sweet; and peace is a pleasant and a healthful thing; for that man can not hold dear his own hearth, nor the laws of his state, nor the rights of liberty, who delights in feuds, or the slaughter of citizens, or public war; and there is nothing more loathsome than the citizen or man— if citizen or man he can be called—who longs for civil war. But our first consideration must be whether war may not be justifiable when the price of peace is slavery."

And again in a letter to Atticus he calls this the most difficult of political problems, namely:

"When our country is oppressed by unlawful tyranny, whether at all costs we must do our utmost to remove it, even though thereby we bring the state into the greatest danger?"

Elsewhere, however, he says in a calmer spirit:

"To my mind Peace with one's countrymen on any terms seems more expedient than civil war."

Cicero, Philippic, XIII; Letters to Atticus, IX, 4; Grotius, I, 4, § 19; Ayala, I, 12, § 4.

4. Whether we should cling to peace when our neighbors are at war?

When the Romans first sought the friendship of the Achæans, and Cleomedon, Philip's emissary, urged a middle course, to remain quiet and abstain from arms, Aristæus the Achæan leader maintained that this was no middle course, but no course at all. For, he said, besides that we must either accept or refuse alliance with Rome, what other fate can befall us (having the firm favor of neither side, for we shall have waited for the result in order to trim our plans to fortune) but to be the prey of the victor? So, too, when Pompey and Cæsar were at feud, Porcius Cato, though in the interests of the state he disagreed on many points with the leaders of the rival parties, and thor-

oughly approved of the aims of neither, attached himself to the party which seemed to have the balance of justice on its side. This is the right course for those who are unequal in strength to the combatants; those who are equal in strength or more powerful may wisely and honorably take no part in wars between their neighbors, so that they may be called in to settle their differences.

Livy, book XXXII; Ayala, I, 12, §§ *17, 18; Bodin, V, last chapter,* § *588.*

SECTION II.

Of Questions of Status between those at Peace.

Questions of status between those at peace arise when an inquiry is made as to the condition of a prince, or people, or their subjects. Whether status remains the same, is changed, or lost? and the like.

1. Whether the German emperor may also be called Roman?

John Bodin says that the Germans usurped the title of the Roman Empire for the sake of the glory of it, and the jurist Costalius says that he does not know whether and where the Roman Empire exists; and Sleidanus, a German by race, in his speech to Charles the Fifth, even says that the Roman Empire is fallen and scattered, like the three empires that went before it. For once its rule extended far and wide to the eastern and western sun; now all that it held in Asia and Africa is lost; once it possessed the greatest and most fertile parts of Europe, but now out of that great mass, as it were, many other kingdoms have grown, entirely separated from the body itself, and there is absolutely nothing left of it save the title and name, which Germany still retains; for upon her last of all was bestowed the power of creating the Cæsar, who, however, is so entirely unworthy of comparison with the ancient Roman emperors that he does not even occupy the ancestral seat and ancient residence of the Cæsars, the City of Rome.

Others say that the Roman Empire devolved on the German because the right of choosing the Roman Emperor always lay with the people of Rome; when an emperor was chosen by the legions, the people of Rome ratified his election; when he lived at Constantinople, the Quirites of Byzantium, who were Roman citizens, gave their consent; finally, when a woman, Irene, after blinding her son, had seized the Eastern Empire, the Roman citizens would not tolerate it, and by their acclamations chose Charles the Great, to give peace to Italy by his arms, to be Emperor, and caused him to be crowned by Leo the Third, the Roman Pontiff. By this title all the possessions of the Roman Emperor which had not been abandoned or seized by others or which had not passed by treaty or right of war into the dominion of others, passed to him and his successors.

With this agrees what is told in the vision of Daniel, that the Roman Empire, which was partly of iron and partly of clay, would endure till the end of the world. Nor does it seem to be any objection that they do not retain the vastness and splendor of the old Roman

Empire; for Jerome interpreted the fact that the foot of the image ended with toes partly of iron and partly of clay, to mean that the Roman Empire, which was formerly strong and powerful, would afterwards become infirm and weak; and though the greater part of it has been seized by others, yet it is not wholly destroyed. Still less can it be thought to have disappeared because the seat of Empire has been removed; because as a state is not bounded by walls, so an empire is not limited to a fixed place. Rome once existed at Veii under the guidance of Camillus, and the Roman Emperor continued to exist after he fixed his seat at Constantinople.

Grotius, II, 9, § 1; Arumaeus, Discourse on Politics, I, 2; Limnaeus, on Public Law, I, 4.

2. Whether the imperial dignity is derived from coronation by the Pope?

On the death of the Emperor Henry, some of the electors chose his brother Philip to be emperor, while others chose Otto. A question having accordingly arisen, a legate was sent by the Pope who confirmed the election of Otto; and when the princes on Philip's side questioned his right to this power, Pope Innocent the Third replied that he recognized the right of the princes to choose a king for promotion to be emperor, for that right came to them from the Apostolic See; but the princes on their side ought to recognize that the right of examining the person to be promoted to the throne regarded himself, who anointed, consecrated, and crowned him. Pope Adrian, indeed, in a letter to Frederick, writes much more haughtily, saying:

"The Roman Empire was transferred from the Greeks to the Alemanni, on the understanding that the King of the Teutons should not be called emperor before his coronation by the Pope; whence then does he derive his title save from us? He receives the name of king by the election of his own princes, but he receives the name of emperor, Augustus, and Cæsar by our consecration. Therefore his empire is derived from us, and, as Zacharias transferred the empire from the Greeks to the Teutons, so we may transfer it from the Alemanni to the Greeks."

So Alciati, too, says that from the time of Charles the Great the right to choose the Roman emperor has lain with the Roman See. The Germans, however, maintain that an emperor elected and proclaimed by the electors is truly emperor, even though he has not yet received coronation by the Pope; and that Charles the Great received the empire from the votes of the people, not from the Pope, whose duty it was to crown him. They urge that crowns are as a rule placed on other kings by the archbishops or bishops of their own kingdoms, yet that the kings do not for this reason owe their kingdoms to them. And they point to many emperors who never were crowned by the Pope, as for example Maximilian the First, Ferdinand, Maximilian the Second, Rudolph, and

Matthias, who never asked it. Nay, at the celebration of the coronation of the Emperor Charles the Fifth by the Pope at Bologna, when a great bridge, on which the Emperor was walking, collapsed, some persons, according to Cornelius Agrippa, turned the incident into an omen and prophesied that in future no emperor would be crowned in Italy.

Alciati, Formula of the Roman Empire; Arumaeus, Discourse on Politics, 3; Besold, on Precedence, ch. 2, § 4.

3. Whether the emperor has sovereignty over other kings and princes?

That other kings and peoples ought to be subject to the emperor is held by many jurists, Italian and Ultramontane, as well by those who profess the canon law as by those who profess the civil law. The canonists argue that God made two great lights in the firmament of heaven; that is, that He established two chief dignities, the Pope and the Emperor; that Christ said with the same meaning, " Behold, two swords "; that there went out a decree from Augustus that all the world should be enrolled. The Legists say that the Emperor Antoninus, in a rescript to Eudæmon of Nicomedia, said " I am lord of the world "; that in some places in the Civil Law all things are said to belong to the prince, that is, to the emperor. And so Bartolus boldly declares that he is a heretic who says that the emperor is not lord and monarch of the whole world. The Citramontane doctors hold the contrary view; the emperor never was lord of the whole world, because in the days of the chief monarchies there were also kings who were never subject to him; that the Roman emperors sometimes address their constitutions not " to all peoples," but to all peoples subject to their rule; that in the practice of commerce they distinguish those who obey the rule of Rome from those who are subjects of the King of the Persians; that they also recognize other free peoples, with whom they have rights of war, capture, and postliminium; that although God has created two kinds of powers, ecclesiastical and temporal, yet He has not set over them *two* supreme heads alone. They argue that when Augustus ordered all the world to be enrolled, and when Antoninus called himself lord of the world, it must be understood of the Roman world and of that part of the world over which the Romans ruled. Ulpian too reads the constitution of Antoninus as meaning that those who were in the Roman world were made citizens of Rome. The Jews too said that Jerusalem was situated in the middle of the world, that is to say in the middle of Judæa, or the world inhabited by the Jews. Finally they argue that Bartolus, in declaring that any who held a different view was a heretic, was no less mistaken on the point than were those who decreed that any who affirmed the existence of the Antipodes should be regarded as a heretic.

Chassanaeus, Catalogue of the Glory of the World, part V, 28; Covarruvias, II, § 9, Peccatum; Francis de Victoria, Theological Relections, V, §§ 2, 3; Grotius, II, 22, § 13; Limnaeus, on Public Law, II, 8; Arnisaeus, on the Law of Treason, I, 2, where the question is fully discussed.

4. Whether a prince or people changes status by dependency or by an unequal treaty?

Clients or dependents are under protection, not under dominion, as Sulla says in Appian, and Proculus says:

"As we recognize that our clients are free, though they are not equal to us in authority or dignity or rights generally, so it must be recognized that those who are bound to respect our majesty with a good grace are also free. Nor is it any objection to this that sometimes the word 'command' is applied to the superior, and the word 'obey' to the inferior, as happens in matters in which both are interested."

So Thucydides says:

"It becomes those who are the chief parties in a treaty to claim no special advantages for their own interests, but to have more influence than the other parties in settling matters which affect all."

It often happens, however, that under the form of protection and treaty inferiors are subjected to the sovereignty of superiors. Thus Polybius observes that the Thessalians were nominally free, but were really under the sovereignty of the Macedonians; and the Latins used to complain that under the shadow of a treaty with Rome they endured slavery. This happens if no protest is made when troops are brought in for a garrison, and when an unequal treaty is made perpetual.

Grotius, I, 3, § 21; Bodin, I, 7, § 68; Arnisaeus, on the Law of Treason, I, 4.

5. Whether it detracts from the majesty of a prince or people to admit laws from other sources?

At the beginning of the Roman Republic, when the kings had been expelled and the people were living under uncertain law, it was resolved to send men to Greece to bring from there the laws which were written on the Twelve Tables. And afterwards, when the empire was at its zenith under Tiberius Claudius, to regulate the business of sailors and merchants engaged in maritime trade, the Rhodian laws were obtained from the island of Rhodes, which laws were inserted in the Corpus of Roman Civil Law. Others, however, have entirely declined to adopt foreign laws, urging that those who adopt the laws of others seem also to recognize their sovereignty. Thus the Senate of Paris by an ancient decree and Philip the Fair by an edict declared that no one should set up the laws of the Romans against the customs and laws of his own ancestors; and the kings of Spain forbade, under penalty of death, the citing of the laws of the Romans as law in their dominions. But indeed, though it is a sign of subjection if the laws of another country are imposed on a prince or people against their will, it is not so if they adopt them freely and voluntarily. It is an intolerable indignity to set up foreign laws against the institutions and customs of one's own country, and accord-

ingly the Emperor Antoninus only adopted the Rhodian laws in so far as they did not conflict with any of his own.

But when the law of the land fails, it is right to have recourse to the laws of others, as the authors who have handed down the feudal customs admit, when they lay down that although the validity of Roman laws does not extend so far as to override use or custom, yet whenever a case arises which is not provided for by the custom of the fief, the jurist may without reproach use the written law, that is to say, the civil law. So although Luther publicly burned the books of Pontifical Law, yet in those dominions of Germany which accept the Augsburg Confession, ecclesiastical causes which do not concern religion are even now decided according to Canon Law. And in England, after the authority of the Roman Pontiff had been repudiated, Canon Law, in so far as it is not repugnant to the statutes of the royal prerogative and the customs of the realm, is accepted; and for the same reasons military causes and maritime causes for which the common law of the realm does not provide are tried in the courts of the constable and the admiral respectively according to the Roman Civil Law.

Digest, I, 2, 2, 4; Jacobus Gothofredus on the authority of the Lex Rhodia, Digest, XIV, 2, 9; Bodin, I, 8, § 101; Choppin, on the Domain of France, II, § 5; Valentine Forster, on the retention of the Canon Law in Reformed Universities; Statute of Henry VIII; Selden, Dissertation on Fleta.

6. *Whether a prince has sovereignty over another prince in his own territory?*

When Mary Queen of Scots was accused of treason and condemned to death by the judgment of the delegates in England, there were, as Camden says, good judges who said that she had been too harshly dealt with, because she was a free and sovereign princess over whom God alone had authority; that she could not be guilty of treason, not being a subject; and that an equal has no power over an equal; for which reason the judgment of the Emperor against Robert of Sicily was pronounced void, because Robert was not a subject of the empire. Others took a different view, urging that she was subject, not indeed by origin, but a temporary subject; for there can not be in one kingdom two princes absolute in point of authority; and an equal has power over an equal whenever the one submits to the judgment of the other, either expressly by words or impliedly by making a contract, or committing a wrong, within the jurisdiction of the other; and they assert that the Pope annulled the Emperor's decision against Robert of Sicily because the act was not committed in the Imperial territory, but in the Papal. Lastly, they point out that there is no great example which does not contain an element of injustice.

Camden, Elizabeth, 1586, on the Reasons of the ambassador of the King of France, and the replies given to the same; Gentilis, III, 8, on the judgment of Charles, King of Naples, against Conradine.

7. Whether a people is to be regarded as the same, when its government has been changed?

Aristotle denies that a state is the same after a change in its form of government, just as, he says, a melody is not the same when it passes from the Dorian to the Phrygian mode. But whether in such a case the debts of a state ought to be paid, is another question which statesmen and jurists may decide differently. And just as a regiment may be regarded in two aspects, as governed by its officers and as serving in war, so a state may be regarded in one aspect as a relation between the parts which govern and are governed, and in another as a legal association; and on this latter view the Roman people was the same people under kings, consuls, and emperors.

Grotius, II, 9, § 3.

8. Whether a people is changed by a change of place?

If a people migrates, whether voluntarily, on account of famine, or compulsorily, it does not cease to be the same people; but if there is a departure to form colonies, a new people comes into being, for, says Thucydides, they are not dismissed to be slaves, but to enjoy equal rights.

Grotius, II, 9, §§ 7 and 3.

9. Whether a prince may ennoble his own subject in the territory of another prince?

When the Emperor Sigismund wished to create the Count of Saxony a Duke at Lyons, the Governor of Lyons opposed him so strenuously that the Emperor was unable to exercise his power freely before he had left the territory of the Kingdom of France. And when the Emperor Charles the Fifth, after being received in France with most generous hospitality by King Francis, had created a number of barons and knights on the petition of the said king, a question afterwards arose, and it was decided that the creations were invalid. The reason given is that a prince outside his own territory is no more than a subject and can not exercise the rights of a prince without infringing the dignity of the other prince. Yet despite these objections the contrary view is rightly upheld, that a prince as regards his own subjects does not cease to be a prince in the territory of a friendly prince; for matters belonging to his voluntary jurisdiction may be exercised outside his territory, especially if (as is said to have been the case with Charles the Fifth) the act is done with the consent of the prince of the territory.

Bodin, I, 9, § 202; Sleidanus, Commentaries, book XII; Josias Nolden, on Nobility, ch. 2, 184; Digest, I, 16, 2.

10. Whether a subject on whom a title has been conferred by a foreign prince ought to enjoy the same in his own country?

For his brilliant services in the Hungarian war against the Turks at Gran, the Emperor, by letters of honor, created Thomas Arundell of Wardour a count of the Holy Empire, and all his posterity and descendants counts and countesses. When, on his return, he began to exalt himself among the people in virtue of this title of honor, the question arose whether such a title conferred by a foreign prince, without the queen's consent, ought to be recognized. Some thought that rewards of valor ought to be recognized, by whatever prince they were conferred; for valor decays unless those who have done good service are encouraged by rewards. They pointed out that Henry the Third, King of England, recognized Reginald Mohun created Count of Somerset by the Roman Pontiff; and that Henry the Eighth, when Robert Curzon had been created Baron of the Holy Empire by the Emperor Maximilian the First, in recognition of his military valor, was so pleased that he enrolled him among the barons of England. The barons of England, however, foreseeing that this practice would diminish the privileges and the dignity of themselves and their order, argued against it thus: Such titles of distinction ought neither to be accepted by subjects nor recognized by the prince; to the prince alone it appertained to distribute dignities among his subjects, following the decree of the Emperor Valerian, that "That alone shall be a title of honor which is borne by our command"; the majesty of the prince and the obedience of his subjects were much impaired if they should be permitted to accept honors from foreign princes. In the Republics of Venice and Genoa any who accepted ecclesiastical dignities from the Pope, or civil dignities from a foreign prince were not called to office in the State, as men whose loyalty was suspect; that Mohun had not been recognized in England as a count was clear from the public records; and Henry the Eighth had treated Curzon as a baron of England in order to destroy without delay the shadowy title of Baron of the Holy Empire; he had not granted a vote in Parliament. The Queen when consulted on the subject declared that, as it does not become modest women to cast their eyes on any man save their husbands, so subjects ought not to look on any prince save him whom God has given them. "I would not have my sheep branded with another's mark, I would not have them follow the call of a strange shepherd." For the same reason, two years previously, the Queen compelled Nicolas Clifford and Antony Shirley, whom the King of France had enrolled in the order of St. Michael, to make their resignation, to send back their insignia, and to see that their names were removed from the rolls of the order. When the King of France heard of it he is reported to have said: "If the Queen wishes to do a like favor to myself, she can, if she

choose, elect any scheming Frenchmen whom she next sees in England, to the order of Arthur's Round Table."

Camden, Annals, 1596 and 1594.

11. Whether, when the same prince is head of two kingdoms, one born in one kingdom has the rights of a subject in the other?

By the English common law a stranger, or one born out of the kingdom, can not inherit lands or estates within the kingdom. When James, King of Scotland, succeeded Elizabeth on the throne of England, Robert Calvin, born in the kingdom of Scotland, brought an action against John Bingley, claiming certain lands in the city of London by right of inheritance. To this Bingley, on the other side, objected that Calvin was an alien, having been born in the kingdom of Scotland, within the allegiance of the King of Scotland, and without the allegiance of the King of England; and, therefore, that he could not be the heir of lands within the kingdom of England nor bring an action for the same. For Bingley it was argued that although the two kingdoms of England and Scotland were subject to King James, yet the two kingdoms had been and still were distinct and separate: that each kingdom had its own crown, its own laws, its own separate seal; and it was regarded as an established principle that when two rights meet in one person, the result is the same as if they resided in different persons. For Calvin it was contended that it was clear from the English judicial records that when the same persons were Kings of England and Dukes of Normandy and Aquitaine, which also had different laws and customs, subjects of the duchies were capable of inheritance in England; and that even then the same right was admittedly competent to subjects born in Ireland and the islands of Guernsey and Jersey. And so the Lord Chancellor and twelve judges, that is the entire court with two exceptions, gave judgment in favor of Calvin. Of these two the Chancellor said that just as the doubts of the Apostle Thomas gave occasion for more firmly believing in the resurrection of Christ, so the hesitation of the two (whose names were Thomas) gave their brethren the stronger grounds for confirming their opinion.

Speech of Lord Chancellor Egerton in the Exchequer Chamber, Coke, Reports, book VII.

12. Whether a citizen or a subject may leave his country or state without obtaining permission?

We know, says Grotius, that there are peoples, the Moschi for example, where this is not allowed, and we admit that a society can be formed with this as one of its conditions, and that customs have the force of an agreement. But we ask what ought to be the rule by nature, in the absence of any special agreement on the point. And certainly it

is clear enough that the citizens can not depart in a body. For if that were allowed, civil society could no longer subsist. As for the departure of individuals, the case seems different. Every one has the free power, says the jurist Tryphonius, of determining his own state; and Cicero in the Pro Balbo approves of the principle that no one shall remain in a state against his will, and he says it is the foundation of liberty that every man should be free to decide whether he will retain or abandon his own rights. Yet here, too, the rule of natural justice must be observed that there is no such right, if the interests of the society so require. For, as Proculus rightly says, it is not the private interest of one member of the society that is to be observed, but the advantage of the society as a whole. Now it is to the interest of a civil society that a citizen should not leave if a large debt has been contracted, unless he is prepared to pay his share at once. So, too, if a war has been undertaken in reliance on the number of the citizens, especially if a siege is imminent, unless the citizen is ready to provide an equally efficient substitute to defend the state. Beyond these cases, it may be considered that peoples agree to the free.departure of citizens.

Grotius, II, 5, § 24.

13. Whether the same person may be a citizen of two states at the same time?

Cicero in his speech " Pro Cornelio Balbo " says:

" A wonderful and admirable, aye, an inspired principle has been established by our forefathers from the beginning of the Roman name—that no Roman can be a citizen of more than one state; for the dissimilarity of states necessarily involves variety in law."

But Cicero also says, in the second book of the Laws, that he and all citizens have two countries, one by nature, the other by law, as for example Cato who was born at Tusculum and was adopted into the society of the people of Rome. This was supported by the opinions of the jurists: thus Paulus says that the senators would in this way seem to have a domicile in the city, and yet they are also deemed to have a domicile in the place of their origin. And the Emperor Antoninus said to Silvanus: " Since you claim to be a Biblian by origin, but to reside at Berytus, you are rightly compelled to discharge public duties in both cities."

To this it is answered that although Cicero allows that citizens may have two countries, and in the Laws is ready to grant two domiciles in different states, yet this only holds good of cities subject to Rome, since one country or state contains the other; or again when the two cities are under the same prince, as Biblus and Berytus belonged to the same province, Phœnicia. And the inference that a man with property in different places is therefore bound to discharge public duties in those places does

not hold good when a man removes to a foreign state which is subject to a foreign people or prince, or when it is a question of civil privileges. This distinction is accepted by Baldus the Perugian, who says that a Perugian, that is, a man born at Perugia, who lives at Siena or Florence, does not leave his place of origin, because Perugia, Siena, and Florence are in the same province; but when a man removes to another province he abandons his place of origin, changes his state, and is reckoned as belonging to the new province and state.

Jean Bacquet, Treatise on the Droit d'Aubain, chs. 39 and 41, in the suit between Cenamy and Longueval; Digest, I, 9, 11; Code, X, 38, 4; Baldus on Code, IV, 12; Grotius, II, 5, § 24.

14. Whether one who has lived for a long time in a foreign kingdom and has married there is to be regarded as having renounced the country of his birth?

On the death of Jean de Cenamy in France, Jean de Longueval entered upon the inheritance in right of Isabella d'Asnières, his wife, a kinswoman and legatee under the will of the deceased. Some years later proceedings about the inheritance were instituted against Longueval to establish the title of Pandolphe de Cenamy, the brother of Jean. Longueval objected to Pandolphe's title, that, although he had indeed been born in Paris, yet he had lived at Venice for more than thirty years, had established a domicile there, had married a wife and begotten children, and accordingly had lost all the rights of a subject of the Kingdom of France. He argued that a man becomes a citizen of the state into which he is received, because, as Tacitus says, where a stranger enters into a marriage alliance the land to which he comes is his country; and the prophet Ezekiel said, strangers who come to you and beget sons among you shall be to you as native-born.

For Pandolphe it was contended that, although he had lived long at Venice, he retained the rights of his place of origin, and therefore the rights of nature; because on the authority of Cicero no man loses his citizenship except of his own action; nay, as the Emperor Diocletian says, no man, even of his own wish, can divest himself of his citizenship of origin. It was urged that Pandolphe while living at Venice had never been given citizen-rights there, and that no man can become a citizen unless he is enrolled as a member of the state: just as men who lived at Rome did not become Roman citizens unless they received the right of the Roman toga. As to the custom of France, an alien, however long he lived in the kingdom, could not enjoy the civil rights of the kingdom unless they had been extended to him by the favor and grant of the prince. To this Longueval replied that also according to the opinion of Cicero a man could divest himself of citizenship, not only by committing crime, but also by abandoning his own state and enrolling himself as a member of another, and he pointed to the fact that, as Tranquillus

records, a Roman citizen was held before Nero to be an alien because he had abandoned his citizenship of his own choice and without committing any crime. He argued that a tree of ours, which has pushed its roots into another's land, changes ownership, ceases to be ours, and inheres in the soil of the other. That at Rome it was necessary to obtain the toga, and in the kingdom of France letters of naturalization, as they were called, were requirements introduced on account of the importance of the countries or for some special reason; other nations were not in the habit of enrolling citizens by name or of making a formal gift of citizen-rights. These and other arguments for himself and for his opponent are recorded by Longueval, who was an advocate at Paris.

The president of the Parisian Court, however, gave judgment for Cenamy, and the Court of Parliament, to which Longueval appealed, upheld the decision. Bacquet says that the judges were influenced by special reasons, and that their opinions in this case must not be regarded as stating the general law. Perhaps, however, they had regard to the principle that though residence and domicile in a foreign kingdom are sufficient to make a man subject to the jurisdiction and liable to the discharge of public burdens, yet they are not sufficient to make him a citizen in the sense that he shares in those civil privileges which belong to those born in the kingdom, without the supervention of a special enrolment. This was the rule not merely at Rome and in France, but also elsewhere. Thus Cicero says:

"By our law any man can change his state, provided that he is adopted by the state to which he wishes to belong: so that, if the Gaditanians, for example, were to pass a decree about some Roman citizen by name, he has power to change his state."

And Plutarch records that Solon enrolled as citizens, exiles and others who had come to Athens of their own accord: and to be admitted to office is the same as enrolment. Cicero relates that this happened to certain Roman citizens, who, ignorant of the risk of losing their Roman citizenship, occupied seats among the Areopagites with a particular tribe and number. Pomponius Atticus, however, was wiser, for although he lived long in Athens, he refused for that reason to accept the honors offered to him.

Bacquet, Droit d'Aubain, ch. 41; Eguinarius Baro, commentary after the last law of Digest I, 5.

15. Whether one born in a foreign kingdom is entitled to the rights of a subject in the country of his paternal origin?

Mary Mabel, born of French parents in England, sued John de Valle, the son and heir, for a share of the goods of her grandmother Adenetta de Valle, who died at Paris. De Valle objected that she was born in England, a foreign kingdom, and that therefore, as she was an

alien, she had no right to succeed in France. For Mabel it was replied that even if she was born in England, still her place of origin was France, where her parents were born, and that she had a right to succeed in France, which though not her own country of origin, was that of her father, the more so as she had come to France with the intention of remaining and acquiring a domicile there, as was proved by letters from the king. The view that the place of her father's origin gave her a sufficient title was supported by many authorities on the civil law. Thus Ulpian says: "The son of two Campanian parents is a Campanian"; and "The son follows the state where the father was actually born, not the domicile of the father." And in support of the argument from Mabel's return to France, Ulpian says again, "A son born among enemies has the rights of a son if he returns to his father's country by postliminium."

It was replied on the part of de Valle that France was not subject to the Roman civil law; that by the custom of the land and the alien law, commonly called the "Droit d'Aubain," regard must be had to the place of origin or birth, not to family or descent; and that by this law sons born in France succeed to their alien parents who die in France, which would not be the law if the birthplace of the parents and not that of the children were taken into account. Sons born among enemies, it was submitted, enjoy the benefits of postliminium because their parents in captivity acquire no rights among the enemy: whereas Mabel's parents had acquired rights in England where they had lived for twenty years. Judgment was given for Mary Mabel on the first ground and on the second. On the point that she, born of French parents, had come to France with the intention of remaining there, the judgment followed the authority of the decision of Boerius of Bordeaux, by which it was laid down that a son, conceived and born in Spain of a French father and mother, who had gone to Spain with the intention of living there all their lives, having returned to France to his father's domicile of origin with the intention of remaining there, should be admitted by the custom of France to the right of "retraction," that is, to redeem possessions sold by his father; for the paternal origin, united with the domicile acquired by the son, was held to outweigh the son's own origin, especially in circumstances raising a presumption favorable to that view.

Bacquet, Droit d'Aubain, V, 39; Boerius, Decisions, 13; Matthaeus de Afflictis, Neapolitan Decisions, 384; Bertrand, Opinions, III, 157, § 16, and IV, 177.

16. Whose subject is one who has been surrendered by his own people, and not received by another people?

Mancinus was surrendered by the Romans for having made an unauthorized peace with the Numantines. Not being received by the Numantines, he returned to Rome and entered the senate, from which

Publius Rutilius, tribune of the people, ordered him to be led out, saying that a man whom the paterpatratus had surrendered was not a Roman citizen. Some have held that Mancinus, since he was not received by the enemy, remained a citizen; and this view is supported by Cicero, who says that a man can not be said to be surrendered who is not accepted; for there is not deemed to be either gift or surrender unless there is acceptance.

Others have agreed with the tribune of the people, that a man whom the State has rejected ceases to be a citizen, even though he is not accepted by the enemy, no less than a man under the interdiction of fire and water, or under sentence of deportation to an island. The jurist Modestinus seems to accept this view, giving his opinion that a man who is surrendered to the enemy and returns to his own country, unless received by his countrymen, is not a citizen; and this seems to be the better view, for Pomponius records that a law was passed making Mancinus a Roman citizen, which would have been superfluous if he had remained a citizen without it.

Ayala, I, 15, § 24; Digest, XLIX, 15, 4; Digest, L, 7.

17. Whether a refugee who has passed into the allegiance of another prince is bound by the laws of his own country?

John Story, an English refugee, having been enticed on board a ship which was said to have conveyed heretical books to the Netherlands, was carried to England, where he was accused of treason for having revealed plans for invading England. He refused to submit to the laws, on the ground that he had abandoned England and placed himself under the allegiance of the King of Spain; but on the authority of the jurists he was condemned and punished as a traitor; since no man can divest himself of the country in which he was born, or the land of his birth, or renounce allegiance to his prince at pleasure. Perhaps it ought to have been decided otherwise if Story had been banished from England; for an exile who subjects himself to the power of another sovereign and is received by him is not bound by the authority of his former sovereign.

Camden, Annals, 1571; Bodin, I, 6, § 59; Grotius, II, 5, § 25.

SECTION III.

Of Questions of Ownership between those at Peace.

Questions of ownership between those at peace include questions of Occupation, Prescription, Probability of Right, Transfer, and Succession.

1. Whether possession of a thing can be acquired by the throwing of a javelin?

The Andrians and Chalcidians, having set out for Thrace to seek a new home, and receiving news that the barbarians had abandoned Acanthus, sent scouts, who, having ascertained that the barbarians had fled and the place was deserted, began a race to decide which people should by prior occupation acquire the city, which they regarded as abandoned. As the Chalcidian was the swifter, the Andrian hurled a spear and planted it in the gate of the city, and called out that he was first with his javelin; the Chalcidian, on the other hand, exclaiming that he was first with his person. A discussion having arisen from this incident, they called in the Parians, Samians, and Erythræans as arbitrators. The Andrians urged that it was not necessary to apprehend with the person the possession of a thing abandoned; it might be apprehended by the eyes, and intention alone; but here a weapon had been hurled as well, and therefore they were lawfully in possession; for if possession may be acquired by breaking a twig, throwing a pebble, or delivering a rod, why not by the hurling of a spear? The Chalcidians, on the other hand, contended that it was one thing to obtain possession by delivery from another by this or that method, another to occupy a thing without any delivery; for as long as a thing is not held by another, it may become the property of the occupant; as one who has wounded a wild animal is not considered its owner until he has caught it physically, for many things may happen to prevent him catching it; so, after the gate had been struck, it might have happened that he who had thrown the javelin would fail to get possession of the city. The decision was given in favor of the Andrians by the majority, for the Samians and Erythræans voted for them and only the Parians for the Chalcidians, as Plutarch relates.

Ayrault, Judgments, V, 21, 1.

2. Whether the sea may be appropriated by occupation?

The jurist Ulpian says that the sea is open to all, and Celsus that the use of the sea is common to all. Paulus, however, maintains that if

a special right over the sea belongs to any man, an action by him lies where he is in possession. It is admitted, says Grotius, that the Law of Nations does not forbid the acquisition of sovereignty over the sea; and so Dio Cassius, he says, spoke of "all the sea which belongs to the Roman Empire"; and in the year's truce of the Peloponnesian War the Megarians were permitted to navigate the sea belonging to the territory of themselves and their allies; he even concedes more than this where the same prince holds the territories bordering a sea on either side, as happened in the case of the English Channel when the King of England was Duke of Aquitaine and lord of several places on the coast.

Morisotus, however, maintains that even if the kings of England were dukes and lords of Gascony and Aquitaine, yet they acknowledged the king of France as their overlord in those parts; and hence, although the use and profit of the sea of Aquitaine and Normandy was with them, the jurisdiction and supreme lordship over it remained with the kings of France.

John du Tillet, however, in the second book "De Rebus Gallicis," frankly admits that the kings of France had no sovereignty over the sea, for their kingdom had been cut down by partitions and the kings confined to narrower dominions, because powerful vassals held the chief fiefs with full sovereign power, if you except their fealty; for the King of England, he says, held the duchies of Normandy and Aquitaine, Brittany had its own duke, and Flanders, Toulouse, and Provence their counts.

Grotius, II, 3, 13, and fully in the notes thereto; Morisotus, Maritime World, II, 19; Grotius, The Free Sea; William Welwood, Reply to Grotius; John Selden, The Closed Sea.

3. Whether princes or owners of a territory may appropriate things cast up on the shore?

The Emperor Constantine Augustus thus decreed:

"Whensoever by shipwreck a ship shall be driven to shore, or shall put in to any land, it shall belong to the owners, and my treasury shall not intervene; for what right has the treasury in the calamity of another, that it should claim a profit from so grievous an event?"

But by later law, or rather by an evil custom, it has become the rule that those who possess territories bordering on the sea may plunder the goods of shipwrecked persons which are driven to shore, as well of subjects as of foreigners. So when the ambassador of the Emperor complained before Henry the Second, King of the French, that two ships cast ashore had been captured by Jourdan Ursin, and claimed to have them restored, the Constable, Anne de Montmorenci, replied that things cast ashore belonged by the Law of all Nations to the prince who ruled the shores.

René Choppin records that in Sicily, on the Italian shores, and in England, the profits of wrecks are accounted royal perquisites; and also that the same right belongs to the Duke of Brittany; for as the Breton princes foresaw the occurrence of frequent wrecks on that rocky and harborless coast, they issued an edict limiting the right of persons to put to sea at their own will, under which the dukes gave licenses to those about to make a voyage, after they had first consulted persons well acquainted with the sea and the coasts; and if any neglected to secure this leave, and a shipwreck occurred, what remained of the ships and the cargoes was confiscated to the state. This rule might not unreasonably be established by a prince so as to affect his subjects, but it could not confer any right to the goods of foreigners.

Code, XI, 5, 1; Bodin, I, last chapter, § 171; Choppin, on the Domain of France, I, last chapter, § 10.

4. Whether a newly founded city belongs to the territory in which it is founded?

The Jews and Syrians contended for the city of Cæsarea before Nero; the Jews maintained that it had been founded by Herod, that Herod had led a colony of Jews thither, and that it was therefore a Jewish city; the Syrians, on the other hand, urged that it had been founded in Syrian territory, and that Herod had advanced and enlarged it, rather than founded it. For whereas formerly it was known as Turris Stratonis, and inhabited by Syrians, Herod had called it Cæsarea, changing the old name, but not the old colonists, and it was incredible that he had built it with the intention of assigning it to the Jews, because in Cæsarea he had set up temples, and in the temples images, which are not allowed among the Jews. The Emperor was convinced by these arguments and held that it belonged to the Syrians.

Ayrault, Judgments, V, 21, 7.

5. Whether ownership and right may be determined by conjecture?

When the Athenians and Megarians were vigorously contending for the island of Salamis, the Spartans Critolaidas, Amompharetus, and Cleomenes, were called in as arbitrators, and, Solon pleading the Athenian cause and Hereas the Megarian, it was held that the island belonged to the Athenians. The ground of the decision was that the inhabitants of the island, in burying their dead, followed the rites of the Athenians and not those of the Megarians; for they had tombs placed towards the east, the bodies turned towards the rising sun, and the names of the families engraved, which customs they still employed. Not unlike this was the judgment in the case of the Isle of Mona or Man. This Island, as Giraldus Cambrensis records, being poised midway between the northern parts of Ireland and Britain, was the subject of a keen

dispute among the ancients as to which land it ought rightly to belong to. In the end the dispute was set at rest in the following manner: Ireland does not breed poisonous animals, but it was found that the island had admitted poisonous snakes which were brought by way of experiment, and accordingly public opinion declared that it should be awarded to the Britons.

Ayrault, Decrees, II, 46, 3; Camden, Britain, on the Isle of Man.

6. Whether new possession may be awarded on the strength of an ancient title?

When the Athenians and Mityleneans were contending for the town of Sigeum, which was in the Trojan territory, they agreed at length to accept Periander as arbitrator. The Mityleneans claimed an ancient dominion, because it was certain that the Athenians under Pisistratus had forcibly seized the town from the Mityleneans; the Athenians, on the other hand, asserted that they themselves and the other Greeks who, under the leadership of Agamemnon, had lent their aid to Menelaus in the matter of the rape of Helen, had as good a right to Trojan territory as the Mityleneans. Accordingly Periander decided that each party should keep what they held.

Ayrault, Decrees, 58, 1, 2, and 3; de Thou, book LIX, Speech of the Duke of Nevers to the King of France, in the year 1574.

[7] *Whether in a question of ownership between others arbitrators may pronounce in favor of their own right?*

The people of Aricia and Ardea accepted the Roman people as judge in a question of doubtful title to certain land. An assembly of the people was convened by the magistrates, and the question was hotly debated; and the witnesses having now been produced, at the moment when the tribes should have been summoned and the people given their votes, Publius Scaptius arose and, against the authority of the consuls, with the support of the tribunes, declared that he was in his eighty-third year and had served in the land in question, not as a young man, but when already a veteran of twenty years' service, during the war at Corioli; his memory was clear that the land in dispute had belonged to the people of Corioli, and on the capture of that place it became by right of war the public property of the Roman people; he marveled how the people of Ardea and Aricia, who never claimed the land while Corioli still stood, could hope to wrest it from the Roman people, whom they treated as judge instead of owner. The consuls, observing that Scaptius was heard not merely in silence, but with approval, calling on gods and men to witness that a great sin was being committed, sent for the leading senators, and with them implored the tribunes not to allow judges to

commit the worst of crimes, one which would be even worse as a precedent, by turning the dispute to their own advantage; especially as the gain derived from appropriating the land would be infinitely less than the loss incurred by alienating the hearts of allies by a wrong; for the injury to fame and honor was beyond all reckoning. These and the like arguments the consuls shouted aloud; but the spirit of cupidity, and its author Scaptius, prevailed; the tribes were summoned and gave judgment that the land belonged to the Roman people. Nor is it denied that it did so belong, had resort been had to the judgment of others.

As it is, says Livy, the dishonor of the judgment is in no wise atoned for by a good cause; and this judgment the Roman Senators considered as shameful and cruel as did the people of Aricia and Ardea.

More cruel and shameful still was the conduct of Philip, King of Macedonia, who, when two brothers, kings of Thrace, had chosen him to decide a dispute about boundaries, unknown to the brothers, came to the trial, as to a war, with an army in full array, and robbed them both of the kingdom for which they were contending; thus showing, says Curtius, that concord is the strongest of all supports for the preservation of empires and the establishing of kingdoms.

Livy, book III, at the end; Dionysius of Halicarnassus, book XI; Quintus Curtius, book I.

8. [7] *Whether "usucapio" or prescription runs between different princes?*

When Antiochus demanded certain cities from the Romans which his father and grandfather had never claimed, the Romans pleaded a possession of a hundred years, a period which covers three generations of men. Vasquez, however, denies that the right of "usucapio," which was introduced by the Civil Law, has a place in the relations between different kings or peoples. But if this is conceded, there will follow the great inconvenience that no lapse of time will extinguish controversies about kingdoms and their boundaries. And so the Laconians, in Isocrates, lay it down as absolutely certain, and admitted among all nations, that public possession, no less than private, is so confirmed by time that the possessors can not be ejected, a presumption of abandonment being raised by the lapse of a long time.

Grotius, II, 4, 12, etc.; Gentilis, I, 22.

9. [8] *Whether a right over the kingdoms of the West was transferred to the Roman Pontiff by the gift of Constantine?*

It is related that when the Emperor Constantine was suffering from the dread disease of leprosy, and the skill of the physicians was unable to cure him, the native priests advised him to bathe in a vessel filled with

the warm blood of infants; but when many had been brought for this purpose, and the priests were prepared to cut their throats, the Emperor shrank with horror from the ghastly deed. And in the same night the apostles Peter and Paul appeared to him and announced that they had been sent by Christ to warn him to receive the Christian religion and Holy Baptism at the hands of Sylvester, Bishop of Rome; having done which, he felt himself healed and purified, and on that account gave to Sylvester and his successors the City of Rome, Italy, and all the kingdoms of the West forever.

To strengthen the credibility of this story the following arguments are urged: The chapter dealing with this gift, inserted in the first part of the Decretals, and the authority of that chapter are not only approved by Innocent and the canonists, especially by Cardinal Alexandrinus, but are also quoted by the legists Bartolus, Baldus, Cynus, and others in many places. An uninjured example of the whole work published in Latin from the Greek Codex in the Vatican Library, by Bartholomew Picernus, and dedicated to Pope Julius the Second, is extant.

Others, who have investigated the question more expertly, observe that the ecclesiastical writers of that time, Eusebius, Jerome, and Basil, make no mention of this alleged record; that Platina, who collected all the instruments bearing on the status of the Church in temporal matters, records nothing of the kind. Pope Melchiades says that Constantine had embraced the Christian religion before the Pontificate of Sylvester; others say that he was baptized by the Bishop of Nicomedia in Jordan; his sons succeeded him in the Western as well as in the Eastern Empire, and they, and other emperors, held Rome, Ravenna, and other provinces of Italy, for three hundred years after Constantine (as is clear even from rescripts of the Popes); and this chapter in the Decretals, as Antonine, Archbishop of Florence, testifies, is not found in the older books of the Decretals and was not inserted by Gratian, but by another hand which marked this, along with many other passages, as of doubtful credibility, under the denotation "Palea." It is probable that the Italian canonists and legists, out of reverence for the Papal dignity, yielded to a mistake which their sympathies favored; and many have ascertained that the Greek original of Picernus is nowhere extant in the Vatican. Finally, Cardinal Nicholas of Cusa and Pope Pius denied the gift as a monstrous invention; and Laurentius Valla, a Roman and Papal noble, argued in an exhaustive and elegant oration, with many proofs, that Constantine neither made such a gift nor could have made it, nor could the Roman Pontiffs derive any right therefrom.

For the gift of Constantine, see the Canonists and Legists cited in Cathalanus; Bartholomew Picernus, on the privilege of Constantine. On the other side, Ulrich von Hutten, Letter to Leo X; Girolamo Cathalanus, Nicholas of Cusa, Laurentius Valla, on the Gift of Constantine.

10. [9] *Whether the Spaniards alone have a right to the territories of the Indies?*

When Francis Drake, in the year 1580, had returned to England after sailing round the world, Bernadine Mendoza, the Spanish ambassador in England, protested against the English sailing into the Indian Ocean. He received a reply from Queen Elizabeth that she failed to understand why her own and the subjects of other princes should be forbidden the Indies, which she could not be persuaded became Spanish property by the gift of the Roman Pontiff; she recognized in him no prerogative in such causes, much less authority binding on princes who owed him no obedience, to enfeoff, as it were, and invest the Spaniards with the possession of that New World, or with any right other than the right to sail to and fro, to build huts, to name a river or a promontory, which acts could not confer ownership; so that this gift of what belonged to another, which in law was null and void, and this imaginary ownership, ought not to prevent other princes from trading in those regions and founding colonies in places where the Spaniards had no settlement, without any violation of the Law of Nations, since prescription without possession is of no effect.

Camden, Elizabeth, 1581; Grotius, The Free Sea, ch. 13; Nolden, on Nobility, ch. 2, § 56, and following sections.

11. [10] *Which son of a king is to be preferred in the succession, one who was born before the accession, or one born after?*

When the empire was offered to Otto the First, his brother Henry, at the instigation of the Count Palatine, the Duke of Lotharingia, and other princes, claimed it by arms, on the ground that the throne appeared to be the right of himself, as having been born during his father's reign, rather than of Otto, who was born before his accession. On behalf of a son born after accession, it was maintained that when Artabazes and Xerxes, sons of Darius Hystaspis, were contending for the succession to the Persian kingdom, Demaratus the Spartan, who had been expelled from his kingdom and happened to be present at the time, declared that a son born after accession ought to be preferred to one born before, and that on these grounds the throne was awarded to Xerxes.

Guicciardini writes that the same rule was applied in the dispute between the brothers Ludovico and Galeazzo about the duchy of Milan, the latter of whom had been born before their father obtained the duchy, the former afterwards. On the other hand when this same dispute arose after the death of Darius between Arsicas, a son born to Darius in private life, and Cyrus, born after he became king, and Parysatis, the mother of Cyrus, urged the old argument of Xerxes in favor of her son, the Persians nevertheless awarded the kingdom to Arsicas; and again

Herod, King of the Jews, preferred Antipater, his son born before, to Alexander and Aristobulus his sons born after his accession; and the victory in the quarrel between Otto and Henry went to the same side. Hotman concludes that this side has the stronger case; and Grotius agrees with him, on the ground that it is proper that, as this is the law in all other inheritances and successions, it should also be observed in the inheritance of kingdoms.

Hotman, Famous Questions, 2; Grotius, II, 7, §§ 27, 28.

12. [*11*] *Whether in the succession to a kingdom a grandson by an elder son is to be preferred to a second son?*

When a dispute arose in Germany between uncles and grandsons as to the legitimate title to inheritances, the Emperor Otto the First called together the German Assembly to decide it; and when no agreement could be reached in the assembly between the princes and the representatives of the citizens, the question was intrusted to the arbitrament of battle, in which the side of the grandsons won the day. Precedents, however, are adduced on either side. For the second sons there is the story of Procopius, that on the death of Gaiseric, King of the Vandals, Gundamund, his grandson by Genso an elder son, was passed over, and the kingdom conferred on Honoricus, the second son. And Aimoin writes that when Clotaire, King of the Franks, died, Guntran, his second son, was preferred to Childebert, the son of the elder brother Sigebert. For the grandsons there is the incident, related by Plutarch, of Lycurgus, who, after he had reigned about eight months, and the widow of his elder brother Polydectes had given birth to a son, resigned the throne of Sparta to him; and Pausanias records that, on the death of Cleomenes, the Spartan Senate awarded the throne to Ares, a grandson, in preference to Cleonymus, an uncle.

It seems that, as a general rule, a grandson by a first-born son is to be preferred to the second-born in the succession, unless the law requires the eldest next of kin to take the place of the deceased, in which case a second-born son is to be preferred to a younger grandson by an elder son.

Hotman, Famous Questions, 7; John de Terra-Rubea; Grotius, II, 7, § 3; Hotman, Treatise on Royal Succession.

13. [*12*] *Whether a cousin ought to exclude a nephew by the deceased's sister from the succession to the throne?*

Philip the Fair, King of France, had three sons, Louis, Philip, and Charles, and a daughter Isabella married to Edward the Second, King of England, whose son was Edward the Third, King of England. On the death of Philip the Fair, Louis succeeded him; Philip succeeded Louis,

and Charles succeeded Philip. On the death of Charles, the peers or nobles of France admitted Philip of Valois, the cousin of the deceased Charles (he being a son of Charles of Valois who was a brother of Philip the Fair), to succeed to the throne, passing over Isabella and her son Edward; whence followed the most bitter wars between the kings of England and France.

For Philip of Valois against Edward of England it was claimed that by the Salic Law and the immemorial custom of France women were excluded from the succession to the throne of France. Thus, for instance, on the death of King Childeric the Third, his two daughters were excluded and the throne conferred on Clotaire; and on the decease of Cherebert the Fifth, his three daughters were passed over and his brother Sigebert succeeded. And as women themselves are not capable of succeeding, they can not transmit a right to their sons. Secondly, Edward had done homage to Philip of Valois as King of France and sworn to be his liege, thereby recognizing him as king and renouncing his own right, if he had any, to the throne of France.

On the other hand, it was asserted that Edward had good cause to prosecute his right by force of arms. When the question was debated before the peers, his proctors were not admitted, but compelled by threats to withdraw. The Salic law, so often quoted by all historians and jurists, the chief foundation of the Valois claim (as Hotman recognizes), was a fictitious and ridiculous invention; since that law, which enacts that in Salic land no portion of an inheritance may pass to a woman, refers not to the French, but to the Salii, and, as the same authority admits, is so far from applying to royal inheritances that it can not even be referred to feudal successions, but only to allodial lands, which are in private patrimony.

Secondly, as regards custom, a custom contrary to the common law should not be presumed. In Spain, Portugal, Navarre, Sicily, Naples, England, Scotland, women were not excluded from the throne. In practically all the other dignities of France, as for instance in the duchies of Normandy, Brittany, Aquitaine, Burgundy, women succeeded. The precedents of Clotaire and Sigebert, who succeeded in preference to daughters, were not sufficient to found a custom, coming perhaps from times in which the throne was considered not so much hereditary as elective.

Finally, the homage rendered by Edward to the Valois was no obstacle to him, because it was done in his youth, and from the fear that the Valois might invade the Duchy of Aquitaine.

Froissart, and Walsingham, History of the time of Edward III; Chassanaeus, on the Customs of Burgundy section 5, § 38; Hotman, Francogallia, ch. 10, and on the Succession in the Kingdom of France, ch. 2; arguments for either side in the archives of the Bodleian Library.

14. [*13*] *Whether a nephew by a sister is to be preferred to the son of an uncle in the succession to the throne?*

Martin, King of Aragon and Sicily, had an only son Martin, who died before his father, leaving an illegitimate son Frederick; he had also a sister of the full blood, Helionora, and a nephew by her, Ferdinand of Castile, and a kinsman James of Urgela, the son of an uncle John. On the death of Martin, the illegitimate Frederick, James of Urgela, and Ferdinand of Castile contended for the throne. They resolved to submit the matter to the decision of arbitrators. Arbitrators were chosen, three from Aragon, three from Valentia, and three from Catalonia, theologians, jurists, and others, all men of the highest wisdom and probity.

Frederick, the illegitimate grandson by a son of the deceased, contended that he was not altogether illegitimate, being born of a single father and an unmarried mother; the Roman Pontiff had declared him legitimate; and, moreover, he deserved consideration because he had recently, by a most decisive victory, added the kingdom of Sicily to Aragon. James, Count of Urgela, contended that he was a male, descended from a male; that females were excluded from the throne and could transmit to their children no better right than they had themselves.

Ferdinand of Castile contended that he was the son of a mother who had the deceased King Martin for her brother by both parents; and that, as the nearest in blood, he ought to succeed, both by natural law and by the laws of the land. It was not provided by the laws of Aragon that females should not succeed; they were only excluded when there were males and females in the same degree and equally near of kin.

The arbitrators, who, after duly performing the religious rites, had heard the advocates during thirty days, shut up in the citadel, which they were not allowed to leave except after declaring a king, at length came forth in public and, amid the most eager attention and expectation on the part of the whole people, pronounced Ferdinand of Castile King of Aragon.

Laurentius Valla, book II; History of King Ferdinand; Mariana, on Spanish Affairs, book XIX, last chapter, and book XX, ch. 2.

15. [*14*] *Whether, on a failure of the direct line, the head of the next line or the nearer in degree ought to succeed to the throne?*

After the murder of Henry the Third, King of France, the male descendants of the family of Valois failed; and it was admitted that the right of succession to the throne belonged to the Bourbon line, whose head and chief was Henry, King of Navarre, son of the late King Antony, whose brother Charles, Cardinal Bourbon, was also surviving. Accordingly, the greater part of the nobles having recognized Henry of

Navarre as the lawful successor to the throne, the members of the Holy League or Union declared Cardinal Bourbon, as being nearer of kin, king under the title of Charles the Tenth. As a supporter of his right and title they secured a certain Zampini, who published a pamphlet arguing that Cardinal Bourbon, after the death of Francis, Duke of Anjou, who was a brother of Henry the Third, Antony of Navarre being already dead, ought to succeed to the prerogative of first prince of the blood. Antony, dying in the lifetime of the Duke of Anjou, never attained to the prerogative of first prince of the blood, and therefore could not transmit to his son Henry any right to such prerogative, because in the hereditary succession of self-successors, agnates, and cognates, even in feudal and royal succession, the nearest in degree to the deceased person, whose succession is in question, is to be regarded as heir; and accordingly the cardinal, as nearer to the Duke of Anjou, ought, on the death of Henry, to be preferred to the King of Navarre, who was of a more remote degree.

For Henry of Navarre, Hotman and others argued that Zampini, being an Italian, did not understand the distinction between heir presumptive or apparent to the throne and first prince of the blood. The heir apparent to the throne was a son or brother of the king in the same line, as Francis, Duke of Anjou; the first prince of the blood was the first in the next branch or line, as Antony, the father of Henry, to whom under that title the administration of the kingdom had been committed at the celebrated meeting of the Estates of the Realm. Neither in the succession of the heir, nor of the first prince of the blood did degree or age in another line confer any prerogative.

No one doubted that in the first line, that of Valois, the principle that the son of the first-born excluded an uncle had been observed. Why then should not the same hold good among agnates of the next line, which succeeded to the place of the first, seeing that the agnates of a king derive the cause title and right of succession, not from the last king, but from the common author and head of the family, called by the Greeks "*genarchos*" and by the Latins "*progenitor*"? And this, it is said, was supported by the law which ordained that on the death of a king the succession to the kingdom should devolve on his first-born son, or if he was already dead, then on the son's son; and if the king should die without issue, and there should be a failure of heirs male of that line, then that the succession should pass to the next line of the royal family, the same order of primogeniture being preserved.

De Thou, book XCVII, 1589; Camden, Elizabeth, 1589; Zampini, on the Succession of the prerogative of First Prince of France; Reply to Zampini, by P. E. A. (Frankfort, 1589); Hotman, on the Right of Royal Succession, law 4; Choppin, on the Domain of France, book II, ch. 12.

16. [14] Whether on the death of John William, Duke of Cleves and Juliers, the right of succession belonged to the Duke of Saxony, the Margrave of Brandenburg, or the Duke of Neuburg?

On the death of John William, Duke of Cleves and Juliers, without issue, the right of succession to both duchies was claimed by the Duke of Saxony, the Margrave of Brandenburg, and the Duke of Neuburg. The Duke of Saxony claimed on the ground that a hundred years before, on the celebration of a marriage between John, Duke of Cleves, and Mary, only daughter of William, Duke of Juliers, the duchies of Cleves and Juliers were united by the emperor, with the consent of the Estates of either duchy; the issue of that marriage were William, Duke of Cleves, Sybil and other daughters; and Sybil married John Frederick, Duke of Saxony, on condition that if John and Mary should die without male issue, the whole inheritance should descend to Sybil and her husband John Frederick and their heirs. Hence, as John William (to whom the succession had descended from William, brother of Sybil) had died without issue, and his father had left no issue other than daughters, he contended that the right to succeed had devolved on himself, as the heir descended from the marriage of John Frederick and Sybil.

The Duke of Brandenburg relied on the following right: William, Duke of Cleves and Juliers, the father of the deceased John William, had four daughters, Mary, Anna, Margaret, and Sybil; and decreed, with the concurrence of the Estates, that if he should die without male issue Mary (whom he had betrothed to Albert, Duke of Brandenburg) and her heirs should succeed to the duchies. The claimant himself had married the elder daughter of Mary and Albert, who in this case was manifestly the heir.

The Duke of Neuburg asserted that his father Louis had married Anna, the second daughter of Duke William, and that the Emperor Charles the Fifth had granted as a special privilege that if William and his heirs should die without male issue the principality should go to his daughters, and on their deaths to their heirs male; and therefore, since Mary, the first daughter, died before the Duke John William, and left no male heir surviving her, the right to succeed passed to his mother Anna, and from Anna to himself her male heir.

The Prince of Deuxponts, who had married Margaret, William's third daughter, and the Margrave of Burgau, who had married Sybil, his fourth daughter, resolved, in view of the contest of the three more powerful princes for the whole inheritance, to stand by until it should appear what was decided between them.

As the duchies were fiefs of the empire, the Emperor Matthias issued an edict summoning all claimants whomsoever to trial before himself. The Princes of Brandenburg and Neuburg, however, fearing the bias of the Emperor in favor of the Duke of Saxony, agreed together

that the dispute between them should be settled by the Estates of Cleves and Juliers, and in the meantime they committed the ordinance and government of the country to the Estates. The Emperor, indignant at this conduct, sent Leopold, Archduke of Austria, secretly to Juliers; who having entered the city, acted as the Emperor's lieutenant, built fortifications in the city, and sent for military forces from outside. The Prince of Anhalt, coming with troops from France and from the United Provinces of the Netherlands to the assistance of the Princes of Brandenburg and Neuburg, compelled Leopold to withdraw into Germany and his garrison to abandon the city.

The party of the Emperor and the Duke of Saxony was supported by the King of Spain and the Archduke Albert, princes of the House of Austria, the bishops, electors and some princes of the Reformed Religion in Germany. The cause of the Dukes of Brandenburg and Neuburg was upheld by the kings of France and England, the Estates of the Netherlands, the Prince Palatine of the Rhine, and other princes of the Reformed Religion in Germany. When everything was looking towards war, it was agreed, through the intervention of the electors of the empire and others, that the Duke of Saxony should be admitted with the Margrave of Brandenburg and the Duke of Neuburg to the right of possession in the disputed dominions, a right which he obtained in form rather than in reality.

Subsequently secret rivalries and suspicions gave rise to dissensions between the Dukes of Brandenburg and Neuburg; and it was believed that the Duke of Neuburg, in order to gain a powerful kinsman, married the daughter of the Duke of Bavaria and, in order to win the favor of the Emperor and the Catholic princes of Germany, embraced the Roman religion. Afterwards, when these dissensions broke out in war, the Duke of Brandenburg sought help from the United Provinces of the Netherlands, and the Duke of Neuburg from the Archduke Albert.

These events happened at the time when the King of Spain and Albert had made a truce for twelve years with the Estates, but each side retained its army. Accordingly the Marquis Spinola with the soldiers of the King of Spain on one side, Prince Maurice of Orange with the troops of the United Provinces on the other, invaded the duchies, and occupied the towns and principal places, taking possession of them on behalf of the rights of the Princes of Brandenburg and Neuburg respectively; but finding them convenient for reasons of their own, they appeared by no means ready to give them up; which caused Cardinal Bentivoglio to say that weaker princes should beware of the plan of inviting into their dominions the assistance of those more powerful than themselves.

Belgian History, book XVII; Cardinal Bentivoglio, Narrative of the movement of arms in the affair of Cleves-Juliers; Discourse on the succession in Juliers, and Reply to the same, by anonymous authors (Frankfort, 1615).

SECTION IV.

Of Questions of Duty between those at Peace.

Questions of duty between those at peace include questions of the Privileges of Civil Congress and Embassy; also questions of Civil Convention and Treaty, and the Word of Honor and Oath which are added thereto.

1. Whether it is becoming in princes to dispute about place and precedence?

Lactantius says that nothing is more shameful or more arrogant, and nothing more remote from the principle of wisdom, than to dispute about dignity; and many authorities show that in the negotiation of momentous matters the place of sitting often raises a keener contention than do the matters themselves. Moreover such disputes sometimes appear foolish and idle, as in the story, which Warszewicki relates, of the ambassadors of two princes of Italy who met on a bridge at Prague, and neither would give way to the other; so they stood practically the whole day, and made themselves the laughing-stock of all.

On the other hand it is maintained that God is the author of rank, and that it is not inconsistent with humility to regard distinction of degree or rank; and jurists lay down that it is lawful to defend a prerogative of rank and seat by armed force. The public safety and interest, however, should be the first consideration. Thus when a dispute arose in a battle against the Persians, between the Arcadians and Athenians, as to which nation should fight in the front place at Platæa, the Athenians are commended because, in that common danger of their country, they preferred to give way, saying that wheresoever they should be posted, they would show themselves brave men.

Besold, on Precedence, ch. 3, §§ 7, 8; Nolden, on Nobility, ch. 15, § 1, 55.

2. Whether the higher place is due according to the number or according to the eminence of dignities?

There have often been disputes between the kings of France and Spain about the prerogative of seat and precedence. In the year 1556 the Spaniard, having failed to obtain it at the court of the Pope, persuaded his kinsman, Maximilian the Second, to deny the prerogative of the chief place to the ambassadors of Charles the Ninth at the imperial court; which was regarded as so signal an insult that Admiral Caspar Coligny, according to De Thou, strenuously urged the King of France that the cause was sufficient for making war on the Spaniard.

For the Spaniard it was argued that his sway extended in length and breadth further than that of all the other princes of the whole of Europe. For the French king, that the Kingdom of France, its parts being closely united in a continuous circle, and one in language and customs, was in no way inferior in might to the Spanish Empire. Number of titles does not enhance majesty; for when the Emperor Charles the Fifth, in a letter to Francis the First, King of France, added as his titles a recital of numerous provinces and dominions, the King of France wrote in reply, " Francis, by the Grace of God King of France, and Lord of Gonesse," which is almost the smallest village of the whole kingdom, implying that he reckoned the Kingdom of France by itself alone equal to all the provinces of the empire.

Besold, on Precedence, ch. 6, § 6; Bodin, I, 9, § 145; du Moulins, on The French Monarchy; Nolden, on Nobility, ch. 9, §§ 74, 179; Vasquez, in the preface to Famous Controversies.

3. Whether the higher place should be conceded to one who holds a greater or to one who holds a more ancient dignity?

At the conference of Bologna, in the year 1600, between the ambassadors of the Queen of England and the King of Spain, a question arose as to priority of place in sitting and in walking. The Spaniard's first argument was, as usual, the length and breadth of his dominions; to which it was replied that no one should be preferred on account of a plurality of dignities, if none of these of itself was sufficient to give him precedence. Secondly, the Kingdom of Castile, the title of which the Spaniard places before the rest, was recent compared with the Kingdom of England, for it had counts, not kings, before the year of Grace 1017. Thirdly, in the Book of Ceremonies of the Roman Curia, which, as the canons say, as lady, mother, and mistress, gives the rule to others, the first place among kings is appointed to the King of France, the second to the King of England, and the third to the King of Castile. Fourthly, in the Councils of Constance, Siena, and Basel, the King of England held the second place. Fifthly, Julius the Second, the Roman Pope, had pronounced in favor of Henry the Seventh, King of England, against Ferdinand of Castile.

Camden, Annals, 1600; Robert Wingfield, on the precedence of the Kingdom of Britain in the Council of Constance; Pierre Matthieu, History, book VII, 1, § 12; Meteranus, Belgian History, book XIII.

4. Whether an inferior prince who is present in person should be preferred to the ambassador of a superior prince who is absent?

As a general rule it has been established by custom that the same honor in all respects should be paid to ambassadors as would be offered to those by whom they are sent, if the latter were present; and Paschal constantly maintains that ambassadors are the second or twin persons of

the princes who send them. He excepts only the prince to whom the embassy is sent, for it is right that he should occupy the higher place in his own dominions. Conrad Braun, however, mentions that in Germany electors who are present are preferred to the ambassadors of those who are absent, and he says that he himself observed this among the princes. A passage in the Golden Bull, Title 25, supports this. With this, too, agrees the testimony of Colerus that in the assembly of Nuremburg in the year 1542 the ambassadors of Charles the Fifth were placed after his brother Ferdinand; and Sleidanus mentions that the Duke of Cleves, being present, refused to give way to the ambassadors of the Elector of Saxony, who was absent. The explanation is held to be that in a prince present there is actual majesty; in an ambassador, only borrowed and fictitious dignity. Or possibly a custom, differing from the customs of other nations, has grown up in Germany from the constitution of the Golden Bull.

Paschal, Ambassador, ch. 38; Braun, on Embassies; Besold, ch. 5, § 6.

5. [9] *Whether an inferior king ought to give place to a superior, who has been elected, but not yet confirmed?*

When the ambassadors of Charles the Fifth, King elect of the Romans, and of the King of France met at Calais in the year 1521 Antonio del Prato, a celebrated jurist and Chancellor of France, raised a question of precedence against Mercurinus, Chancellor of Charles the Fifth, on the ground that Charles had not yet received unction from the Pope, maintaining that on that account he ought to give place to the French King, as having been already anointed. On the other side it was argued that an emperor, declared elected by the electors, had all the powers which he had after Pontifical coronation, and that the dignity befitting his powers ought also to be his.

Besold, on Precedence, ch. 2, § 4; Arumaeus, on Public Law, dissertation 1, at the end.

6. [10] *Whether in conferences and letters the title of "most serene" should be given to those who are not kings?*

In the negotiations at Bologna, when the instructions of the Queen of England gave the title of Most Illustrious, and not Most Serene, to the Archduke Albert, the ambassadors of the King of Spain obstinately declined to negotiate, unless the title of Most Serene should be added in the Queen's own hand wherever mention was made of the Archduke. It was argued that the title of Most Serene is proper to the emperor and kings alone, who are possessed of majesty; that dukes are merely noble, or at most illustrious. On the other hand, that majesty, in the sense of greater status or power, does belong to dukes; also that against them the crime of treason may be committed, and that many dukes recognize no superior.

Camden, Annals 1600; Rudolphinus, on the dignity of the Dukes of Italy.

7. [11] *Whether those who have not supreme power may send ambassadors?*

Elizabeth, Queen of England, refused to receive Christopher d'Assonleville, who was sent to her as ambassador by the Duke of Alva, because he brought no letter from the King of Spain; and when the Genoese nobles sent Stephano Mario and Bartolomeo Comellino to Philip, King of Spain, Talicarne, of the opposite party in the Genoese Republic, intervened, saying that private persons could not send ambassadors. It is, however, certain that Appius Claudius the prætor sent ambassadors to Hieronymus, son of Hiero, Scipio to Syphax, Lucullus to Tigranes, and Cæsar to Ariovistus. Paschal refers these cases to the greatness of the Roman Empire and says that the governors of great provinces bore themselves as the equals of kings; and further he says that such embassies on matters of common interest, being necessary between coterminous provinces, are allowed when there is no time to consult the supreme power; but he does not think they should be reckoned among legitimate embassies. He says that in the same way the princes of Germany and the Free States have the right of sending ambassadors on matters which concern themselves.

Besold, on Embassies, ch. 3; Paschal, The Ambassador, ch. 13.

8. [12] *Whether religious persons and clerks should be employed on civil embassies?*

Boccalini, in the Parnassian Satire, mentions a certain Zeno, a Stoic with all the gravity of his sect, who approached the shrine of Apollo to offer honor and salutations to the god, before, as he said, setting out on a long journey, he having been appointed by the Prince of Cnidos to undertake an embassy about important business; on hearing which, Apollo reproved the Prince of Cnidos, who was present at the time, for sending on an embassy, after the fashion of some, a person of no magnificence, in order to save expense. Zeno, however, indignantly objected that he and others of the same order went on embassies, contrary to the profession which they make of avoiding above all things the business of courts, and that on them they did not shrink in the service of princes from doing many things which were forbidden by honesty; so that they appear to have deserved the censure of Tacitus, who said that the sect made men into turbulent busybodies.

Under the head of Stoics there is no doubt that religious persons and clerks are included, with which agrees Comines, who records that it was formerly the custom in Spain to transact all business with foreigners through religious persons or monks, either because they knew best how to pretend, or in order to save expense. But not only do the ecclesiastical canons strictly forbid monks or clerks to mix in temporal business, but

the Apostle too warns us that no man who serves God should involve himself in secular business. Campanella, however, a skilful statesman, recommends that ecclesiastical persons should be used for all business, because they are more prudent and cautious, and because, being celibates, they are less likely to gratify personal feelings. And Pierre Matthieu highly extols religious persons and monks for services rendered with happy result to great princes at variance in purpose, or at war with one another, and relates that Saint Bernard went to Mainz to reconcile the Emperor Lothaire with the Emperor Conrad, and that an Augustinian, Conrad Sineta, negotiated peace between the Venetians and the French. The Roman Pope, intervening between Henry the Fourth of France and Philip the Second of Spain, used the services of Bonaventura of Calatagirone, General of the Franciscans, to bear holy and salutary exhortations of peace to either king. Moreover, Father John Ney brought about the truce in the Netherlands, and Hiacynthus, a Capuchin, not very long ago acted as ambassador in the most important negotiations of the Christian world.

Boccalini, Scales of Parnassus, I, 3; Conrad Braun, VIII, 3; Confines, VIII, 16; Pierre Matthieu, History of the Peace; Besold, ch. 4, § 4.

9. [13] *Whether embassies may be intrusted to women?*

When the Sabines were making war with great ferocity on the Romans, because the latter had forcibly carried off the virgins who had come to see the equestrian games, the Senate decreed that as many of the Sabine women as were free should leave their children and go on an embassy to their countrymen; which they did, with the result that peace was made, and a wonderful thing, says Florus, followed; for the enemies left their homes and migrated to a new city, and shared their ancestral wealth with their daughters' husbands as dowry.

Kirchner, however, denies that the Sabine women went on an embassy, because the laws of Rome prohibit women from performing the duties of men. And the edict of the prætor expressly forbids women to plead on behalf of others, because it is contrary to the modesty becoming their sex. Caia Afrania, the wife of the Senator Licinius Buccio, gave the occasion for this edict; who, not because she was without advocates, but because she was a woman of unbounded impudence, assailed the tribunals continually with screams, never before heard in the Forum, so that the name of Afrania came to be cast as a reproach on shameless habits in women. And the jurist Martian lays down that those who have no right of pleading can not go on an embassy.

Paschal, however, contends vigorously against Kirchner's view, and shows that honorable women have pleaded causes with approbation; as when the Order of Matrons was burdened with a heavy tribute by the Triumvirs, and no man dared to lend them his advocacy, and Hortensia,

daughter of Lucius Hortensius, pleaded the cause of the women before the Triumvirs persistently and successfully; for, recalling all her father's eloquence, she secured the remission of the greater part of the money demanded.

Indeed, on some occasions women have been considered eminently suitable for undertaking embassies. When the Senate at Rome debated whether Veturia and Volumnia with other matrons should be sent with an embassy to Coriolanus and the Volsci, who were threatening the city, and the matter was discussed at great length until evening, no one doubted, says Dionysius of Halicarnassus, that the office was one appropriate to women, but some feared that the enemy, by disregarding the Law of Nations, and detaining the matrons and their children, might obtain possession of the city without the hazards of a war; the view, however, prevailed of those who thought that the mother, wife, and other matrons should be allowed to leave the city and undertake the embassy; and when Valeria was persuading Veturia, the mother of Coriolanus, to undertake the embassy, she said:

" If you bring back your son to the city, you will win for yourself immortal glory, by rescuing our country from its great peril; and our honor among men will be the greater for having averted a war which of themselves they could not repel; and we shall be held true descendants of those women who under Romulus averted the Sabine War by the embassy which they undertook, and by reconciling leaders and peoples made this city great instead of small."

Ayrault, on Embassies, ch. 21; Valerius Maximus, VIII, 3; Paschal, ch. 20.

10. [*14*] *Whether an embassy should be decreed for a private cause?*

When Phrynon, an Athenian, was returning from the Olympic contest, he was captured by certain followers of Philip and robbed of all his money. On his return to Athens, he asked the Athenians to decree him an embassy to Philip with the object of recovering what he had lost, and it is said that the people granted his request. By the law of the Twelve Tables such an embassy was forbidden in the following words: " Let no man be an ambassador for his own objects "; and Cicero bitterly attacks such ambassadors, maintaining that nothing is more shameful than for a man to be sent as ambassador otherwise than in the interests of the state. When such an embassy was granted at Rome, it was called a " free " embassy, because it was not limited in time or place, nor liable to render account of its actions. Plutarch records that an embassy of this kind was decreed to Scipio Nasica, in order that he might remain in Asia, whither he was setting out, with greater security and honor, because, should he remain at Rome, he feared the fury of the populace, who were enraged at the murder of Gracchus. Nay, even Cicero earnestly desired for himself an embassy of this kind, as a period

of freedom and leisure, in order that being free from every anxiety he might be the better able to devote himself to study; and Manutius shows that senators were sometimes obliged to procure some such relaxation, since otherwise they were not allowed to be absent from Rome.

Gentilis, on Embassies, I, 8; Paschal, ch. 13; Besold, on Embassies, ch. 2, § 3.

11. [15] *Whether ambassadors should be permitted to take wives with them?*

When Zemosthenes Charmoleus, a Massilian, went on embassies for his country, he took with him his wife Lydimacha, although an ill-favored woman; and Isdigune, an ambassador to Justinian, from Chosroes, King of the Persians, took his wife and daughter with him on that embassy. Others, however, consider the society of their wives both inconvenient and dangerous for ambassadors and rely on the same arguments as those which Severus Cinna used, when he proposed in the senate that no magistrate, to whom a province had fallen, should be accompanied by his wife. Not indeed for nothing, said he, had it been decided of old that women should not be dragged to allies, or foreign nations; the company of women invariably hampered peace with luxury, war with fear, and turned a Roman column into the likeness of a barbarian procession; the sex was not only weak and unfit for toil, but, where wantonness was added, cruel, scheming, and greedy of power. All the worst of the provincials at once attached themselves to such women, who took in hand and managed affairs.

Others, however, take the view of Valerius Messalinus, who replied to Cinna. In many respects the harshness of the ancients had given way to better and happier rules, but little had been allowed to the needs of women, who are no burden even on the homes of their husbands, still less on allies; other things they shared with a husband, nor was there any hindrance to peace in this; and what more honorable thing for men returning after their labor than a wife's consolation? Granted that some were led astray into scheming or greed. What of magistrates themselves, were not many of them the victims of one passion or another? yet it was not on that account proposed to send no one to a province. Husbands were often corrupted by the vices of their wives; were all therefore to remain unmarried? it was vain to call our own sloth by other names, for the husband was to blame if a woman erred. Moreover, because of the weak will of one or two, it was ill to wrest from husbands the fellowship of their wives in good fortune and in bad, and at the same time to leave a sex, which was by nature weak, exposed to its own temptations and the lusts of others; it was difficult to keep the marriage tie intact, even with protection at hand; what would it be if it were destroyed during several years by what was practically a divorce? When they had

to deal with sins committed elsewhere, let them always bear in mind the wickedness of the city, and so on.

The jurists too lay down that ambassadors, like magistrates, may take their wives with them at their own risk; as to which Ulpian says that it is better for a proconsul to go to a province without a wife, but he may go with one if he knows that the Senate, in the consulship of Cotta and Messala, resolved that account and satisfaction is to be exacted from the husbands for any offense committed by the wives of those who go out as public officers.

Tacitus, Annals, III; Paschal, ch. 33; Besold, on Embassies, ch. 4, § 11; Digest, I, 16.

12. [*16*] *Whether an embassy may be executed by some of the ambassadors only?*

When Constantianus, one of the ambassadors from Justinian to Chosroes, was detained by sickness, Sergius, the other ambassador, refused to enter Persia; on the other hand, when disease had carried off Callicrates, an ambassador of the Rhodians, Diæus, the other ambassador, went on to Rome. And of many Indian ambassadors to Augustus, three only, according to Strabo, reached Rome and executed their embassy, the length of the journey and other hardships having carried off the others. Paschal says that it is as clear as day that the ambassadors who are not prevented may act for the others; so, too, in regard to provincial ambassadors it was provided by law that, if obliged, they might employ another to execute the embassy. So the Roman ambassadors, who were sent to Jugurtha when he was besieging Adherbal, as soon as they landed at Utica, sent a messenger to him with a letter in which they intimated that they had been sent to him by the Senate and bade him come to the province with all speed.

Paschal, ch. 31.

13. [*17*] *Whether admission may ever be refused an ambassador?*

The Romans announced to the Ætolians that if ambassadors came they would be treated as enemies; and they told the ambassadors of Perseus that it would not be safe for them to come; and Coriolanus threatened to treat as spies any who came to him. Gentilis, indeed, maintains that it is lawful for a prince or people to forbid embassies to come to themselves, because otherwise a stranger might establish himself on a strange soil against the will of its lord; but they ought to see that such prohibition is made for some good cause. Grotius says the Law of Nations does not order that all ambassadors should be admitted, but forbids them to be repelled without cause. Just causes for refusing admission are:

(1) If the person sending the ambassador is unworthy; whence Justinian refused to receive the embassy of Totila, who was always treacherous; and Polybius relates that the ambassadors of the Cynethenses, as being a wicked nation, were everywhere repelled.

(2) If the person sent is unworthy; whence Lysimachus refused to give audience to Theodorus, who was called the "atheist," when sent by Ptolemy.

(3) When the reason for sending the embassy is suspect; whence the Romans ordered Perseus not to send to Rome, but to Licinius.

Gentilis, II, 5; Grotius, II, 18, § 3; Paschal, chs. 36 and 41; Besold, on Embassies, ch. 4.

14. [*18*] *Whether an ambassador can go beyond his instructions in the public interest?*

The Athenians punished with death the ambassadors whom they had sent into Arcadia, although they returned home successful, on the ground that they had traveled by a different route from that which had been ordered them; and when the consul Attilius, who had been sent by the Senate into Greece to protect the Athenians and the Ætolians against Philip, stormed and sacked Hestiæa and Anticyra contrary to the instructions of the Senate, the Senate, when the news reached Rome, decided that Flaminius should be sent at once to succeed Attilius.

Sometimes, however, it is advantageous to the commonwealth that an ambassador should be of a versatile mind and use other methods than those which have been prescribed, to gain the same end. Thus when the State of Lampsacus, in order to appease Alexander, who was threatening them with all manner of evil, sent Anaximenes, a man well-known both to his father Philip and to Alexander himself, and the King, knowing his purpose in coming, called the gods of the Greeks to witness that he would do the exact opposite of what he asked, Anaximenes, having heard of this, when he came into the King's presence, said: "I beg you, O King, by the gods and our friendship, to reduce the wives and children of the people of Lampsacus to slavery, to destroy their city, and to spare not even the temples of the immortal gods"; and his prayers so prevailed that Alexander pardoned the state.

Valerius Maximus records that the ambassadors sent by the Senate to Tarentum to demand restitution, having met with very grave insults there, and one of them having even been bespattered with urine, on being introduced into the theatre, discharged their office in the words which they had received and made no complaint of what they had suffered, in order not to say anything beyond their instructions. Not so scrupulous, however, about his instructions was the Carthaginian ambassador who openly declared in the Senate at Rome that his toga had been stolen from him ten times since his arrival there.

Paschal, chs. 56, 57, 58; Besold, ch. 7, § 3.

15. [*19*] *Whether a prince is bound by what his ambassador does beyond his secret instructions?*

Ferdinand and Isabella, King and Queen of Spain, refused to consider as binding a peace made by the Archduke of Austria, their son-in-law, who had very wide instructions, on the ground that he had made the agreement contrary to his secret instructions. This was wrong, says Gentilis, and unbecoming in a prince, whose pen and tongue should be one; whereas these princes had two pens and two tongues; and, what was more intolerable, one of the pens and one of the tongues was unknown to the enemy; if this practice were to be admitted, there could be no certainty in making a treaty.

Grotius takes the following view: In a general agency it may happen that our agent binds us by acting against our will as signified to him alone; because here there are distinct acts of will, one by which we bind ourselves to regard as valid whatever he does in a given class of matters; the other by which we bind him to ourselves not to act except according to orders known to himself, but not to others. This must be noted, he says, in regard to promises made by ambassadors for kings which are covered by their commission of agency, but exceed their secret instructions.

Guicciardini, VI; Gentilis, III, 14; Grotius, II, 11, § 12.

16. [*20*] *Whether an ambassador should be allowed to conduct the causes of subjects of his king?*

Ships laden with merchandise and goods, belonging to subjects of the King of Spain, once put into English harbors; and when a suit was started concerning them in the Court of Admiralty in the name of those subjects, the King's ambassador wished to appear on their behalf. It was doubted whether he ought to be allowed to appear, because he had been sent here to manage the public affairs of his King; and because one who appears for others ought to have their instructions. It was replied that the affairs of subjects concern a prince, since it is to his interest that they should not suffer loss, in order that they may be richer and better able to bear public burdens: that any one can defend the absent without instructions, and appear against despoilers, and that the cases of the Spaniards were cases of spoliation.

Gentilis, Spanish Advocation, I, 18; Wesenbecius, Code, III, 16, 24.

17. [*21*] *Whether an ambassador may use lies?*

Henry Wotton, sent as ambassador for James, King of England, to the Venetians, was asked, while passing through Germany on his way, to write a token in the album of a certain nobleman and wrote as follows: "An ambassador is a good man sent abroad to lie for his country." Scioppius, twisting this into a libel on the King, wrote that he had found

a weapon against the fame and reputation of the King not to be despised, for his ambassador to the Venetians, so far from concealing the fact that he had been sent abroad to lie for the King, actually boasted of it everywhere. To efface this insult, Wotton wrote to Mark Welser, the magistrate of Augsburg, that the definition was perhaps catholic enough to include even Legates a Latere, but he was surprised that Scioppius should open the records of friendship, and after eight years revive a stale joke and interpret it as though it had been written not merely seriously, but even boastfully, and that, not content with that, he should have tried by his jokes to bring into contempt the unsullied name of the best of kings, as though masters were bound to account for the jests of their servants.

Paschal writes on this question:

"I would have an ambassador rely on truth, the most certain of the virtues, and her faithful comrade reticence. Yet I am not so simple or rude as to exclude the diplomatic lie altogether from the mouth of an ambassador. Assuredly if it is used so that error may be pardoned, vengeance foregone, or innocence assisted, the odium of the word will be forgotten, and the merit of the act alone remain. Certainly when other ways of helping a man in danger are closed, I hold it to be beyond doubt that this way, though crooked, should be tried."

"I think," says Diphilus, "that a lie spoken for the sake of safety does no harm." When Hannibal left Africa and crossed to the Island of Corcyra, he ordered himself to be described as a Tyrian ambassador when questions were asked. Xenophanes too, the head of the embassy sent by Philip to Hannibal, used means of escape of this kind; for these ambassadors, while making for Capua, were carried into the midst of the Roman guards and brought before Marcus Lævinus, the prætor, who was encamped about Nuceria. There Xenophanes boldly said that he had been sent by King Philip to the Senate and People of Rome, to enter into friendship and alliance with the Roman People.

Sometimes an embassy, such as that of the Gibeonites to Joshua, is designed for no other purpose than to tell a lie: and this is pardonable if the purpose of the lie is not the destruction of those to whom it is addressed, but the safety of those who use it.

Wotton, Letter to Welser; Paschal, ch. 54; Besold, on Embassies, ch. 4, § 6.

18. [22] *Whether security is due to ambassadors from others than those to whom they are sent?*

The ambassador of Philip, King of Macedon, having been sent with a letter to Hannibal with a view to making an alliance, was arrested and brought to the Roman Senate, but dismissed unhurt: but, as Justin says, only in order that a hitherto doubtful enemy might not be turned into a certain one. For the Law of Nations on the security to be afforded to

ambassadors does not apply to those through whose territories ambassadors pass on their way to others without permission. However, if they are ill-treated, the dignity of him who sends them, or of him to whom they are going, is offended and friendship is endangered.

Gentilis, II, 3; Grotius, II, 18, § 5; Ayrault, on Embassies, ch. 18; Besold, ch. 5, § 18.

19. [23] Whether security is due to an exile sent as ambassador to his own prince?

Perseus, King of Macedonia, sent an Illyrian exile as ambassador to Gentius, King of the Illyrians. Gentilis says that it is quite clear that if an exile returns to places forbidden to him, he may be punished, and that the title of ambassador does not help him. If the Illyrian suffered no harm, it must be ascribed not to the law, but to the circumstances of the case; in this question of embassies the strict letter of the law is often somewhat relaxed; and if Gentius received the exile as ambassador, he could not refuse him the rights of embassy, when he had once been received. Yet our own Edward Coke, a great master of the law of his country, but not equally learned in that which holds with foreigners, says that if an exile is sent as an ambassador to a place from which he has been banished, he can neither be detained nor injured; and to confirm this he mentions that when Reginald Pole, who had been found guilty of treason and was living at Rome, was sent as ambassador by the Pope to the King of France, and Henry the Eighth, King of England, asked the King of France to send him across to England, he did not obtain his request. Pole, however, at that time was ambassador, not to the King of England by whom he had been proscribed, but to the King of France, to whom he was neither subject nor in any way bound. But afterwards, in the reign of Philip and Mary, when he was performing what was regarded as the most holy of embassies from the Pope, in order to win over the Kingdom of England, although two peers of the realm by royal command went as far as Brussels to meet him, yet he did not venture to enter the kingdom further than Dover, until the law of his proscription had been repealed in Parliament and he had been restored to all rights of nobility and country.

Gentilis, II, 10; Coke, Jurisdiction of the Courts, ch. 26; Godwin, Annals, 1537 and 1554.

20. [24] Whether an ambassador may be sued in a civil action in the place where he is discharging his embassy?

Gentilis holds that an ambassador ought to submit to judgment on any contract into which he has entered during the period of his embassy; either, as Julian says, that ambassadors may not be able to carry home with them the property of others; or else, to give the reason of Paulus, because otherwise no one would be willing to contract with them, and in

a sense they would be cut off from business relations. Although these views of the jurists refer to a provincial ambassador, yet the principle, when examined, shows that the same law should apply to more important ambassadors also. Paschal holds the same view, on the ground that ambassadors can themselves sue for loss which they have suffered during the period of the embassy. Grotius lays down the contrary rule, and says that the movable goods of an ambassador can not be taken as security or to satisfy a debt, either by process of judgment or by royal power. For an ambassador ought to be free of all constraint, whether touching things that are necessary to him, or touching his own person, in order that his security may be absolute; so that if he has contracted a debt he should be summoned to pay in a friendly way, and, if he refuses, application should be made to him who sent him as ambassador; so that in the last resort the process is the same as that used against debtors outside the jurisdiction.

Gentilis, II, 16 and 17; Paschal, ch. 37; Grotius, II, 18, §§ 9, 10.

21. [25] *Whether persons guilty of an offense may be taken out of the house of an ambassador?*

Certain Venetian citizens, Abondio, Cavazza, and Valerio, who had betrayed the secret counsels of the senate to the great injury of the State, on being detected, took refuge in the house of the French ambassador, and when their surrender was refused to the officials who demanded it, a boat with warlike equipment was posted in front of the house, and at length they were handed over and put to death. When the King of France learned of this, he refused for some time to admit the Venetian ambassador into his presence, and afterwards, when the ambassador approached him in public, he complained of the indignity of the action, and said that the Venetians would not take it with equanimity if his officials made the same outrage on the house of their ambassador. To which the Venetian ambassador at once replied that, if any were traitors to the king, he only wished they might be caught within the shelter of his house; he would at once hand them over, since he was sure that if he were to do otherwise the State of Venice would be far from approving of his conduct.

Paschal, who discusses at length the jurisdiction of ambassadors, holds the following view on this question: if the person demanded is accused of treason, or a very heinous crime, the house of the ambassador ought to be open to the magistrate seeking him; apart from such crimes he thinks that the house of an ambassador ought to enjoy a special privilege.

Grotius distinguishes between the staff or household of an ambassador, and others, and decides that if the staff commit some grave offense, the ambassador may be asked to surrender them, but they must not be

forcibly carried off; when this was done by the Achæans to some Spartans who were in the company of Roman ambassadors, the Romans cried aloud that the Law of Nations was violated. If the ambassador refuses to surrender them, satisfaction should be demanded from the prince who sent the ambassador, and if he refuses, war should be declared against him, as the abettor of the crime. But as regards others, he says, the question whether an ambassador has the right of asylum in his own house for any one who flees thither, depends on the grant of the prince to whom he is accredited. It does not exist by the Law of Nations.

Paruta, X and XI, 1541; Paschal, ch. 76; Grotius, II, 18, § 8.

22. [26] *Whether an ambassador who commits an offense should be sent back to his own prince?*

Although the ambassadors of Tarquin, who had stirred up sedition at Rome, deserved to be treated as enemies, yet, says Livy, the Law of Nations prevailed, with the result that they were not put to death. But when Philæas of Tarentum was performing an embassy at Rome, and found a way of approach to the Tarentine hostages, and by tempting them in frequent conversations and bribing the jailers procured their escape from custody, and fled with them on their journey, he was brought back with them, and having been brought into the Comitia, with the approval of the people, was beaten with rods and cast down from the Rock. With him, however, sterner measures were taken because he had been an ambassador of Roman subjects.

In another case, says Polybius, of an ambassador who had instigated hostages at Rome to escape, nothing was done beyond ordering him to leave the territory. After weighing the opinions of different writers on this point, Grotius seems to decide that if the ambassador's offense is such that it may be passed over, no notice should be taken; if the crime is more serious, and likely to lead to public injury, the ambassador should be sent back to the prince who sent him, with a demand that he should either punish or surrender him, as the Gauls demanded that the Fabii should be surrendered to them; but to meet an imminent danger, he may be detained and questioned, as the proceedings in the case of the ambassadors of Tarquin indicate. But if an ambassador is meditating armed violence, he may be put to death, not by way of punishment, but by way of natural self-defense.

Gentilis, on Embassies, II, 18, § 10; Paschal, ch. 74; a pamphlet styled "Quaestio vetus et nova"; Grotius, II, 54; Camden, Annals, 1571 and 1584.

23. [27] *Whether a prince may validly contract a marriage by proxy?*

The Emperor Maximilian, after having for some time sought the hand of Anne, Duchess of Brittany, in marriage, at length won the consent of the maiden, and the matter went so far that not only was the

marriage contract publicly celebrated by proxy, but the Duchess, as though actually wedded, was solemnly laid on the marriage bed, and the ambassador of Maximilian in the presence of a great many nobles placed his leg bared to the knee between the marriage sheets, such a ceremony being regarded as a consummation of the marriage. Charles, King of France, however, who desired no less to see the Duchy of Brittany united to the Kingdom of France, than to see the Duchess united to himself, with the venal aid of matrons and counselors, won the heart of the tender maiden to himself. He argued, firstly, that the contract of marriage with Maximilian was invalid because the Duchess, being a dependent and ward of the King of France, could not bind herself save by his authority and consent. Next he found theologians to declare that the fictitious mode of consummating the marriage was rather an idle invention of courts than a rite approved by the Church. In the end the Duchess, moved by reasons of this sort, and preferring to have a king in the flower of youth as a husband, rather than as an enemy, deserted Maximilian, and flew to the marriage with Charles. Thereafter it was said in jest that the bereaved Maximilian was so very cold a suitor that he thought it enough to marry by proxy, when by undertaking a short journey he might himself have settled the matter beyond all dispute. Others, however, better judges of the facts, held that a signal injury had been done to Maximilian, which, if his strength had been sufficient, would have afforded a most just cause for war and vengeance.

Bacon, History of Henry VII

24. [28] *Whether a treaty may be made with those who are strangers in religion?*

Asa was reproved by the Prophet for entering into alliance with the Syrian; and Paul says "Be not yoked with unbelievers." Asa was reproved because he distrusted God; and Paul forbids marriage with idolaters, which threatens a greater danger, that difficulty may be thrown in the way of true religion. But it has always been lawful to contract a treaty with those who are strangers in religion to abstain from injuries. Also no reason can be found why it should not be lawful to enter into treaties of commerce and the like with the heathen for the common advantage. And so far as military alliance is concerned, it is well known that the Asmonæans made a compact with the Spartans and the Romans, with the approval of the priests and people. Yet an exception must be made if the heathen are likely to derive great increase of strength from such an alliance; much more if war is to be made on men of the same religion; thus Alexander says, in Arrian, that those who make war with barbarians against Greeks are guilty of a grave sin.

Grotius, II, 15, §§ 8, 9, etc.; Gentilis, III, 19; Bodin, V, last chapter; Guay, Alliances of the Most Christian King with the Turk justified against the calumnies of the Spaniards.

25. [*29*] *Whether a prince who has promised help is bound to supply it when he can not do so conveniently?*

In the year 1585 it was agreed between Elizabeth, Queen of England, and the United Estates of the Netherlands that the Queen should send auxiliaries of horse and foot, under a general, and during the war should pay their wages, which the provinces were to repay when peace was restored; in the meantime certain cities and fortresses were to be handed over to the Queen as security. In the year 1595 the Queen declared by Thomas Bodley, her ambassador, that England was drained of men and resources by the long war; she therefore demanded that they should relieve her of the burden of expenses for the troops and repay some part of the expenses incurred. The Estates promised to refund a part of the money and, when she demanded the greater part, they contended that by the terms of the contract the money was not to be refunded until the war was finished and that, if the Queen regarded her honor, she could not draw back from the agreement. She took the view, on the other hand, on the opinions of jurists and statesmen, that every convention, although sworn, must be understood to hold only while things remain in the same state; that a man is more strongly bound to his country than to a private promise; and that princes are not bound by their contract when the contract results in public injury. Bodley persuaded the Estates, afraid to anger so mighty a princess, to promise to relieve her as soon as possible from all the expense which she was incurring on the English auxiliaries and to pay £20,000 for some years.

Camden, Annals, 1585, 1595, and 1598.

26. [*30*] *Whether privileges of commerce or business, which have been agreed upon with foreigners, may be revoked?*

The Hanseatic States complained to the Emperor and the Estates of the Empire, in the year 1595, that privileges once granted by the Kings of England had been annulled. Queen Elizabeth replied, by Christopher Perkins, that these privileges, having been abused, and for other reasonable causes, had been abolished by parliamentary authority in the reign of Edward the Sixth, as unsuited to the times; that in fact they had been granted when shipping and trade were depressed in England, and for that reason their enjoyment had been altogether forbidden in Mary's reign; that the Queen in the first years of her reign had for a time granted them certain others, as the times demanded, until they themselves, without the slightest warning, and for no reason at all, had expelled the English from Hamburg (showing no regard to friendship); that afterwards, however, she had determined to grant them the same conditions of doing business as the English had, but that they had altogether refused them unless they could obtain better terms; although it was not elsewhere the custom, nor was it to be endured, that aliens

should be preferred to natives in the trade of those articles which are peculiar to a country, which was what they were claiming under the privilege.

Camden, Annals, 1597.

27. [31] *Whether a treaty which contains provisions as to allies is to be extended to future allies?*

After the war about Sicily between the Roman people and the Carthaginians, a treaty provided that the allies of each people should be secure from the other. The Romans after the treaty enrolled the Saguntines as allies, whom Hannibal afterwards attacked. Livy says that provision had been made for the Saguntines, the treaty having excepted the allies on each side; for the treaty did not say, " those who were allies at the time "; and as new allies might be taken, who could think it right that those who were received into allegiance should not be defended? Grotius, however, thinks that future allies were not included, because the questions involved were whether a treaty had been broken, which is an odious matter; and whether the Carthaginians were to be deprived of the liberty to coerce by arms those who were thought to have done them injury, which is a natural liberty and not lightly deemed to have been given up.

Grotius, II, 16; Gentilis, I, 22.

28. [32] *If allies are at war, to which side should assistance rather be given?*

Demosthenes thought that the Athenians ought to give help to their allies, the Messenians, against the Spartans who were also their allies, if the wrong began on the side of the latter. If the members of a league engage in hostilities with one another for unjust causes on both sides (as may be the case), no assistance should be given to either side; if they are at war with others, that is with people who are not members of the league, each having a just cause, if help in men or money can be sent to both, it should be so sent. But if they ask for the presence of him who has promised help (which is a thing indivisible), reason demands that preference should be given to the one with whom is the older treaty.

Grotius, II, 15, § 13; Bodin, V, last chapter; Gentilis, III, 16, etc.

29. [33] *Whether successors are bound by a treaty?*

By a treaty between the Emperor Charles the Fifth and Henry the Eighth, King of England, in the year 1542, it was agreed that if the provinces of the Netherlands should be the scene of war, the King of England should supply five thousand foot-soldiers for four months. After Henry's death, when the King of France invaded Luxemburg, the Emperor demanded assistance from Edward the Sixth, King of Eng-

land, in accordance with the treaty; and although the King on certain other grounds was held free from obligation to afford it, yet it clearly appeared that a treaty is extinguished with the person of the contracting party. Thus the people of Fidenæ, after the death of Romulus, professed themselves freed from a treaty made with him; the Latins, after the death of Tullus, the Etruscans after that of Priscus, and the Sabines after that of Servius, claimed to be released from the bonds of treaties; and although treaties of peace and friendship may be considered perpetual, conventions of mutual assistance are considered more temporary, especially when some serious obligation is undertaken by the state. Grotius, however, draws the following distinction: if princes agree for themselves simply, the treaty is personal and is extinguished with the person of the contracting party; but if they promise for themselves and their successors, it is more lasting; as also if a clause is added that it is to be perpetual, or for a definite time, or for the good of the kingdom, or if the treaty is made with a free people.

Hayward, History of Edward VI; Grotius, II, 16, § 16; Gentilis, III, 22; Ayala, I, 7, § 10; Bodin, I, 8, § 103.

30. [34] *Whether conventions and treaties between princes are interpreted strictly, or on principles of fairness and equity?*

Some say that there are no contracts "*bonæ fidei,*" except those mentioned in the Civil Law, where contracts "*bonæ fidei*" are discussed. The passage of the Civil Law in question treats only of private law, not of public law, and the law which extends outside a state; but Tully says that equity is prescribed by the "Jus Feciale"; and Alciati, that in the contracts of princes more absolute good faith is required; and Baldus maintains that all dealings with princes or with the representatives of princes are "*bonæ fidei,*" and that scrupulous interpretations and disputes about minute points of law are to be rejected, for these should be strange to those whose duty it is to regard truth alone, which the Law of Nations cherishes. And so Charles the Fifth and Louis King of France were blamed for advancing interpretations of words and agreements, which were worthy, not of princes, but of pettifogging lawyers.

Gentilis, II, 13; III, 14; Grotius, II, 16, § 10.

31. [35] *Whether an oath obtained by fraud is binding?*

Joshua and the Princes of Israel bound themselves by an oath to spare the Gibeonites, who pretended that they came from a distant region; which oath they also kept after they knew that they had been deceived. Grotius lays down the following principles: if it is certain that he who swore supposed something to be a fact which is really not a fact, and that, if he had not believed this, he would not have sworn, the oath will not bind him; but if it is doubtful whether he would not have

sworn the same oath, even without that belief, he must stand by his words, because an oath in the highest degree demands plain dealing; and we may conjecture that this was the explanation in the case of Joshua and the leaders of Israel. For the Divine law, which doomed them to extermination, was to be understood on the analogy of other law only to apply where persons did not immediately do what was commanded them. Wherefore, since it was probable that if the Gibeonites had revealed the true facts (which they did not do for fear) they would have obtained their lives on condition of obeying, the oath was binding.

Grotius, II, 13, § 4; Gentilis, II, 5; III, 19.

32. [*36*] *Whether an oath extorted by fear is binding?*

Cicero praises the tribune Pomponius, who kept an oath which he was compelled to swear by fear; so binding, he says, was an oath in those days. But although he who caused the fear obtains no rights, because he gave cause for the injury, none the less he who swore is bound to stand by his oath; thus we see that the Hebrew kings were upbraided by the Prophets because they had not kept the word which they had sworn to the Babylonian kings.

Grotius, II, 13, § 4.

SECTION V.

Of Questions of Wrong between those at Peace.

Questions of wrong between those at peace are questions in which, for example, we ask who are liable for wrongs? Or, again, is a thing an Offense against Status, Ownership, or Duty?

1. Whether injuries inflicted by subjects affect a prince or people?

When the Scyrians had assaulted some Thessalians who had come to trade, robbed them of their goods, and cast them into prison, the Thessalians on their escape brought the matter before the Amphictyons. They held that the injury must be punished as a public, not as a private, injury, because the Scyrians ought to have seen to it that strangers might do business among them in freedom and security. But when the governors of the Netherlands gave a number of persons letters of marque to take spoil from an enemy on the high seas, and some of them seized property of the Pomeranians, who were friends, and then throwing off their allegiance roamed the high seas, the Pomeranians on this ground made a complaint against the governors. But in this case Grotius advised that they were only bound to hand over the guilty parties if they could find them; and further to see to it that judgment should be given against the goods of the robbers; for that any one should be liable for the acts of his servants without any fault of his own was no part of the Law of Nations. So too the Rhodians in the Senate distinguished the public cause from the cause of private individuals, saying that there is no state which does not sometimes contain wicked citizens. One who knows, however, that his subjects are offending and has the power to stop them, and does not do so, is liable: thus Agapetus says in Justinian: "To offend, and not to stop offenders, is the same thing."

Ayrault, Decrees, II, 3, 1; Grotius, II, 13, § 20; III, 21, § 2; Gentilis, I, 21.

2. Whether a wrong is to be imputed to a prince who receives one who does wrong elsewhere?

Quintus Martius, the ambassador of the Romans, charged Perseus, King of the Macedonians, with a crime against the Romans, in having received the murderers of Arteratus, of all the Illyrian chieftains the most loyal to the name of Rome. Perseus replied:

"I am called upon to render account for the murder of Arteratus, although no charge is made except that his murderers are in exile in my kingdom. I will not refuse these unfair terms, if you in your turn agree

to confess yourselves the authors of the crimes for which any persons who have betaken themselves to Italy or to Rome have been condemned. If you and all other nations refuse this, I too will be among the others. And in heaven's name what avails it that exile should be open to a man, if the exile is nowhere to find a home? Nevertheless, as soon as I was warned and ascertained that the men of whom you speak were in Macedonia, I had them sought out and bade them leave the Kingdom, and forbade them my territories for ever."

Livy, XLII.

3. Whether a fugitive guilty of an offense in his own country must be sent back by the prince of the territory in which he is found?

When a certain Styward, a Scot, who had attempted to remove Mary, Queen of Scots, by poison, was apprehended in England, Edward the Sixth, King of England, delivered him into the hands of the King of France to suffer the penalty of his crime. This conduct was disapproved by some, because, although reason demands that one who commits an offense in his own country should be punished there, yet custom has established a different rule in the matter of sending him back there. And so when Edward Stafford, the ambassador of Queen Elizabeth to France, asked the King of France that Morgan and other Englishmen who were plotting against their prince and country might be expelled from France, he was informed in reply that if they were plotting in France the King would punish them according to law; but if they had plotted in England, the King could not legally take cognizance thereof; all kingdoms were open to fugitives; and every king was bound to guard the liberties of his own kingdom. Nay, Elizabeth not very long before had received Montgomery, the Prince of Condé, and others of French nationality; and at that very moment Ségur, the French ambassador, who was plotting to overthrow the French king, was finding a refuge in England. Accordingly, it has often been provided in treaties that subjects guilty of offenses should be sent back if demanded.

Hayward, History of Edward VI; Camden, Annals, 1584; Bacon, History of Henry VII, on the negotiations between Henry VII of England and Philip of Spain, on the question of sending back the Earl of Suffolk.

4. Whether successors are liable for the wrong of a community?

Arrian condemns the vengeance of Alexander on the Persians, since those who had wronged the Greeks had perished long ago; and Curtius passes like judgment on the destruction of the Branchidæ by the same Alexander. But it seems that punishment may be exacted for the offense of a community as long as the community lasts, because the body remains the same although its parts succeed one another. The contrary, however, is the better opinion, and for this reason, that on the death of those who brought the reproach on the community the reproach itself is extin-

guished, and therefore the debt of punishment, which does not exist without the reproach, is also extinguished.

Grotius, II, 21; Gentilis, I, 24.

5. Whether a prince should avenge injuries received from his subjects when he was a private person?

When Henry, third of that name, King of France, was returning from Poland, Hubert Lanquet, who was then living at Vienna, wrote as follows in a letter to Philip Sydney who was traveling in Italy:

"We shall see what this king will do when he returns to France; for all his friends say that he has determined to grant a generous pardon to all who have done anything to deserve his anger and to receive with favor all who desire it. I pray that he may mean what he says and may act up to it; but we know that no man drives away by noise the birds he wishes to catch in his snare. May he follow the example of his great-grandfather Louis the Twelfth, who, though many persons in the reign of Charles the Eighth had not only opposed him, but even brought him into peril of his life, yet frankly pardoned them all when he came to the throne; and, when his friends wondered that he did not avenge his many injuries, replied, 'Injuries to the Duke of Orleans do not touch the King of France.'"

Similarly Elizabeth, who had been imprisoned during the reign of her sister Mary, and was treated by Sir Henry Bedingfield with a severity unbefitting her rank, on her succession to the throne of England determined on nothing more severe than to bid him, when he deprecated her wrath, to return home in peace; adding that when she had need of a severe jailer she would send for him.

Lanquet, Letter 34, to Philip Sydney; Camden, Elizabeth, introduction; Foxe, Book of Martyrs, Queen Mary.

6. Whether one who increases his strength or builds a fortress in his own territory offends against friendship?

The Romans took up arms against Philip of Macedon, and Lysimachus against Demetrius for reasons of this kind; and some hold that by the Law of Nations arms may rightly be taken up to check a growing power, which when grown too great may do injury. Grotius, however, says that it is utterly opposed to the principle of equity that the possibility of being attacked should give a right to attack; and therefore a remedy should be sought in counter fortifications at home and the like, not in warlike violence. In another passage he maintains that to build fortresses in territories not for defense but for offense is inconsistent with friendship; and so is an extraordinary enlistment of troops, provided that it appears by sufficiently clear indications that these preparations are directed solely against one with whom there is peace.

Grotius, II, 1, § 17; III, 20, § 40; Gentilis, I, 14.

7. Whether it is contrary to friendship to receive the subjects of another?

To receive individual subjects who desire to remove from one dominion to another, is not contrary to friendship, for such liberty is not only natural, but even favored. But it is not lawful to admit towns or large bodies of men, who make a new part of a state, just as it is one thing to draw water from a river, another to divert its course.

Grotius, III, 2, § 41.

8. Whether passage should be refused to friends?

When Agesilaus, returning from Asia, asked for passage from the King of the Macedonians, and the King said he would think about it, Agesilaus said, " Let him think about it, and meanwhile we will make the passage "; nor does it appear he acted over-harshly. Sometimes, indeed, it seems that passage may be refused; for example:

(1) If a passage of armed men is asked for; thus the Venetians refused it to Maximilian the First, who was seeking to go to Rome with an army to receive the Imperial crown, the Venetians pleading that an act of peace needed no armed men.

(2) Passage is lawfully refused to those who bring enemies with them; thus the Brundisians closed their gates on Antony, who brought an enemy with him; and the Carthaginians did the same to the son of Massinissa.

(3) If the passage is not asked for from the prince of the territory; thus when Cymon, about to bring assistance to the Spartans, led his troops through Corinthian territory, he was blamed by the Corinthians for not having addressed himself to the state. " But," said Cymon, " you yourselves did not knock at the doors of the Megarians, but broke them down, supposing that all things are lawful to the stronger."

Grotius, II, 2, § 13; Gentilis, I, 19.

9. Whether the right of commerce may be forbidden to friends?

The right of trading is not deemed to be refused when a particular mode of trading is not allowed, but only when trade is altogether prohibited.

(1) For instance there is no objection to a refusal to allow the importation of what the inhabitants deem wicked, or against religion, or against religious discipline; thus at one time merchants did not take to the Netherlands articles which tend to produce effeminacy.

(2) It also appears to be lawful to prohibit the exportation of certain things, such as gold or silver, to prevent provinces being drained of them; thus the Spaniards and the English place restrictions of this kind in some parts of their kingdoms.

(3) It is lawful to forbid trading so far as to refuse to allow merchants to have access to the more inland parts of a kingdom; thus in

former times the Britons, and at the present day the Sienese, are said not to allow this.

Gentilis, I, 19; Bodin, I, 7; Grotius, II, 2, §§ 11, 12.

10. Whether the property of others may ever be taken against the will of the owners?

One who is carrying on a war may occupy a place in the territory of another, if there is a clear danger of the enemy seizing the same place and inflicting injury therefrom. The Greeks who accompanied Xenophon, when they were desperately in need of ships, seized those that were passing; but they preserved the cargo intact for its owners and also supported the sailors and paid a price. But a question has also been sometimes raised whether one who requisitions the use of another's property is liable for its accidental loss. Thus when an English ship had taken in a cargo on the Etruscan coast, and was about to sail for England, it was unloaded by order of the Duke of Etruria and sent to the war, and while returning thence it was lost on the voyage. The English claimed to have the loss repaired by the Etruscans. In a similar case, when a ship which a prince took for his own use from his subjects had been lost by accident, the jurists lay it down that the prince was liable for the loss; and the case is far stronger when the subjects are those of others. The Etruscan, however, contended that he had hired the ship, and that a hirer is not liable for accidental losses; also that he had promised to guarantee against damage done by act of war; whereas the ship had not been lost at the war. The English reply was that the Etruscan had not in fact hired it, but compelled it by an act of sovereignty; and an act of this kind is rather of the nature of mandate than of hiring; and in law the mandator guarantees the mandatary against accidental losses. Agreement as to payment does not constitute hiring; for, as Tacitus says, payment by one who has power to command has the force of compulsion. Further, a promise to guarantee against loss incurred in an act of war does not exclude loss incurred in a similar manner, especially in a contract "*bonæ fidei.*"

Grotius, II, 2, § 10; Gentilis, Spanish Advocation, II, 26.

11. Whether foreigners may ever invade the territory of another?

If any part of the territory of another people is deserted, it may be occupied by strangers; since what is not cultivated is not deemed to be occupied by others. Thus the Ansibarians once declared that as the heaven has been given to the gods, so the earth has been given to the race of mortals, and whatever is unoccupied is public. Moreover, a habitation should not be refused to those who have been expelled from their own homes, provided they submit to the established authority and give the other guarantees which are necessary for the avoiding of sedition.

Grotius, II, 2, §§ 15, 17; Gentilis, II, 17.

12. Whether aid may be given against allies to foreigners who are oppressed?

Those who say that citizens only are to be considered, deny that any consideration should be given to foreigners. These persons, says Cicero, destroy the communion and society of the human race. The Lazians indeed told the King of the Persians that he was not a just man merely by virtue of doing no unjust act, unless he also defended the unjustly oppressed; and thus they obtained from him an army and assistance against the Romans. Nevertheless we must consider whether a special society or alliance does not derogate from the claims of this general society. Thus when the Samnites, to whom the Romans were united by treaty and friendship, were pressing the Campanians, who were strangers to the Romans, in unjust war, and the Campanians being no match for their enemies fled to the resources and might of the Romans for assistance, the consul, by the authority of the Senate, replied to the ambassadors:

"The Senate, Campanians, regards you as worthy of assistance; but it is right to establish friendship with you only if it can be done without violating an older friendship; the Samnites are united to us by treaty, and therefore we refuse you the help of arms which would be a wrong to the gods rather than men. We will send ambassadors, as it is right we should, to pray our allies to do you no violence."

On receiving this reply, the ambassadors of the Campanians, as they had been instructed, spoke as follows:

"Since you will not guard what is ours, at least you will defend your own; we therefore surrender the Campanian people, the city of Capua, our lands and temples, all things divine and human into your power, Conscript Fathers, and into the power of the Roman people."

Whereupon honor seemed to demand that those who had surrendered themselves should not be abandoned.

Bodin, V, last chapter; Gentilis, I, 15; Grotius, II, 25, § 4, etc.

13. Whether the promises in a treaty may ever be broken?

If one party to a treaty has broken it, the other may abandon it; because each clause of a treaty has the force of a condition. Thus Thucydides says: "The blame of destroying a treaty lies not with those who, on being deserted, resort to others, but with those who do not afford the help which they have promised." Moreover, necessity or superior force will excuse one who is bound by treaty, and he is not to be regarded as a treaty-breaker.

Grotius, II, 15, § 15; Gentilis, III, 24; Ayala, I, 6, § 17.

SECTION VI.

Of Questions of War.

Questions concerning war are those in which some general point is raised, as, for instance, Whether any war is lawful? Whether a war can be just on both sides? Whether a war can be begun by those who have not full sovereign power? Whether a war should be undertaken for reasons not altogether just?

1. Whether any war is lawful?

Plutarch, in his Refutations of the Stoics, says that there is no war between men but is born of vice; some are born of the lust for pleasure, others of an excessive desire for wealth or power. Livy, however, says, that it is an accepted principle of the Law of Nations that arms may be repelled by arms; and the jurist Florentinus says that it is a part of the Law of Nations that we may repel violence and injury; and with this Hermogenianus and Gaius agree.

Grotius, I, 2; Gentilis, I, 15; Ayala, introduction.

2. Whether a war can be just on both sides?

A thing is called *just* either in respect of the act or in respect of the person acting. In respect of the act a war can not be just on both sides. But it may well be that neither of the belligerents acts unjustly. For none acts unjustly save he who knows that he is acting unjustly. Thus two persons may go to law justly, that is, in good faith, on each side. But in embarking upon a war, the gravity of the matter is such that, not content with probable reasons, it demands reasons of the greatest clearness.

Grotius, II, 23, § 13; Gentilis, I, 6.

3. Whether war can be begun by one who has not supreme power?

Gnæus Manlius was charged by his own officers with having made war upon the Gallo-Græci without the command of the Roman people; and Cato gave it as his opinion that Caius Cæsar ought to be handed over to the Germans because he had attacked them in the same unauthorized way. The Germans, however, says Grotius, had no right to demand his surrender; but the Roman people had a right to punish him. Just as the Carthaginian replied to the Romans:

"I do not think that we have to inquire whether Saguntum was attacked on the decision of an individual or of the state, but whether it was attacked rightly or wrongly? For this is our question and complaint, and we have a single matter of dispute with you, namely, whether or not it was allowed by the treaty."

Grotius, I, 3, § 5; Gentilis, I, 3; Ayala, I, 2, § 7.

4. Whether a war may be begun for a cause of long standing?

Polybius and Livy blame Hannibal because when he was about to begin a war against the Romans he did not put forward as the reason for war the loss of Sardinia, but other reasons connected with Saguntum, which were idle and unreasonable. Gentilis, however, does not indorse their opinion. For although, he says, the real cause of war was that the Carthaginians felt as a disgrace the loss of the command of the seas and the seizure of the islands, yet these wrongs were a matter of past history. And he approves rather the decision of Hannibal, who started a war against the allies of Rome for a recent cause, namely that they had succored his enemies and given them refuge. In the same way, he says, the Romans alleged as their cause of war against Philip, King of Macedonia, not the wrongs which he had formerly done them, but the existing state of Greece (as Zonaras tells us), giving as the cause of their action that Philip had invaded Greece, though of course the real reason was their old wrongs.

Gentilis, II, 22.

5. Whether Elizabeth, Queen of England, justly assumed the protection of the Netherlands against the King of Spain?

In the year of Grace 1575, the United Estates of the Netherlands, by ambassadors, offered Holland and Zeeland, either as possessions or as territories to be protected, to Elizabeth, Queen of England, she being a princess descended from the princes of Holland. After giving the matter her mature consideration, she replied that nothing was dearer to her than to keep faith, which was bound up with honor, and worthy of a prince; and it was not yet clear to her how, consistently with her honor and without doing violence to her conscience, she could receive the offered provinces into her possession or protection. On the other hand, she would use all her influence with the Spaniard towards the happy conclusion of peace. Later, in the year 1585, envoys from the same estates entreated her more urgently to accept the dominion of the United Provinces of the Netherlands, and to undertake the protection and championship of their people, who were suffering a most humiliating oppression. Elizabeth at first refused the dominion and protectorate; but at length, after devoting her anxious care and thought to the matter, and herself considering the grievous cruelty of the Spaniards towards the people of

the Netherlands, and their hatred of the religion which she held; fearing also lest the power of the Spaniard might spread more dangerously than ever in territories which were almost contiguous to her own realm and conveniently situated for effecting an invasion of England, she resolved that religion called her to succor the persecuted people of the Netherlands, and prudence to take thought for the safety of the people committed to her charge by frustrating the disastrous machinations of her enemies. Accordingly she openly undertook the protection of the Netherlands.

The Spaniard had the less to complain of in this matter because in the year 1569, when the Butlers, brothers of the Earl of Ormond, together with certain others, had stirred up sedition in Ireland, the Roman Pontiff and the Spaniard had made a treaty with them to bring in their religion and depose Elizabeth from the throne of Ireland. And about the same time, when Norfolk was planning a revolution in England, the same king, encouraged by Pius the Fifth, who was burning with zeal to restore the Roman religion in England and at the same time to remove Elizabeth from the throne, had intended to despatch Chiappin Vitelli with an armed force from the Netherlands to England, and to that end had sent the Florentine Ridolfo, a papal emissary, with a sum of money to the Netherlands, as Girolamo Catena in his life of Pius the Fifth testifies.

Camden, Annals, 1575, 1585, 1569, and 1572.

6. Whether subjects may conspire against the legitimate successor to the throne for reasons of religion?

When Henry the Third, King of France, had no children, and the succession to the throne passed of right to Henry of Navarre and after him to the Prince of Condé, both champions of the Reformed religion, the Catholic princes of France, with the connivance of the Pope and the Spaniard, entered into a secret conspiracy, by the name of the Holy League or Union, for the purpose, under the cloak of defending the Catholic religion, of utterly rooting out the Reformed religion. Those who entered into this conspiracy bound themselves to one another by an oath that they would never suffer any one to reign in France who had professed or wished to profess any other than the Roman Catholic religion; and that they would never admit one who had been brought up in another religion, even though he should abjure it, lest having once gained the throne he should undermine the old religion. That every word of this oath was designed to exclude Navarre and his kinsman Condé, no one doubted. The supporters of the conspiracy argued that the right of succession to the throne by reason of blood depended upon human laws which the people could change; that in a successor other qualities besides nearness of blood should be regarded, lest one unfit to

govern should be advanced to the throne; that religion and the worship of God were the chief end of any state, and therefore that every one should guard against the admission of a prince who was without the pale of the true religion, and whom they suspected to be hostile to the worship of God.

On the other side it was maintained that though it might be that, in kingdoms where successors were supplied by election the people had a right to determine on fit persons, yet in kingdoms in which the succession depended upon hereditary right no one should be deprived of the right which belonged to him by blood. When Lysander proposed a law at Sparta that the most suitable person and not the nearest in blood to Hercules should succeed to the throne, he found no one, as Plutarch tells us, to support his proposal. And when there was a dispute between the brothers Hyrcanus and Aristobulus about the throne of Judæa, Pompey, to whose arbitration the case was submitted, as Josephus records, preferred Hyrcanus the elder, though less suitable, to Aristobulus, the younger brother. An unjust action should not be done in the name of religion. Ambrose, though he believed that Valentine, the son of Valentinian, would do injury not only to himself, but also to his flock and to Christ, yet refused to avail himself of a high state of popular excitement to offer resistance.

Camden, Annals, 1581; Parson (writing under the name Doleman), on Succession, John Hayward, Reply to Doleman; Grotius, I, 4, § 5.

7. *Whether reprisals are lawful?*

The Emperor Zeno says that it is contrary to natural equity that men should be molested for the debts of others; and in a novel of Justinian the retaliatory seizure of goods for the debts of others is forbidden, the reason being added that it is unreasonable that one man should be a debtor and another be forced to pay. It appears, however, to be a principle of the Law of Nations that the goods of all subjects are liable in respect of debts owing by a civil society, or its head, whether owing primarily on their own account or because they have made themselves liable by not enforcing the debt of another.

Grotius, III, 2, §§ 1, 2; Gentilis, I, 21; Ayala, I, 4.

SECTION VII.

Of Questions of Status between Belligerents.

Questions of status between belligerents arise when there is a doubt as to the condition of a prince, a people, or subjects in regard to a war, as, for example, whether certain persons are to be regarded as enemies, or whether men are to be regarded as unfriendly according to their origin or their domicile.

1. Whether those who sin against nature should be regarded as enemies?

Hercules, according to the narrative of Diodorus, compelled the ancient Gauls, who feasted on human flesh, to abstain from that custom; and Alexander subdued the Sogdiani, who had no respect for parents. Vasquez, Molina, and others, however, require for the justice of a war that he who undertakes it should have been injured or else that he should have dominion over the offender. But it should be recognized that kings have the right to demand satisfaction not only for wrongs done to themselves or their subjects, but also for wrongs to any person whomsoever, which are in flagrant violation of the law of nature or of nations; since the power of punishing is not merely derived from civil law, but comes from natural law also. Such wars, however, the object of undertaking which is to exact a penalty, may easily be convicted of injustice unless the crimes are very atrocious and very plain.

Grotius, II, 20, § 40; Gentilis, II, 2.

2. Whether those who are strangers in religion should be regarded as enemies?

Darius, King of the Persians, made war on the Carthaginians, who worshiped the gods with the blood of innocent men. And among other causes of the Peloponnesian war between the Athenians and the Spartans, one alleged cause was irreverence towards those whom they thought gods. Covarruvias, however, following others, says that a war can not be justly undertaken to punish offenses which are committed against God: but it is settled that the following persons may be restrained in the name of human society. (1) Those who worship devils or wicked men; (2) Those who deny that there is a Deity or that He cares for human affairs; (3) Those who persecute those who profess Christianity. Thus Constantine made war on Licinius and other emperors on the Persians because they subjected Christians to penalties. On the other hand it is

agreed that an attack can not justly be made on those who do not embrace the Christian religion, because men can not be won over to that religion by natural arguments; still less on those who profess Christianity but are in doubt or error on certain points, which are either outside the Law of Christ, or seem to have a doubtful meaning within it.

Grotius, II, 20, §§ 44, 45; Gentilis, I, 8, 9, and 10.

3. Whether one who is an enemy subject by origin, but resides among friends, should be deemed a friend?

A citizen of Milan, complaining of a wrong done him by Florentines, was denied justice at Florence. The question was, whether, when the right of reprisals had been granted against the Florentines, it was lawful to seize the goods of a man who, though born at Florence, had dwelt for some time at Rome? And it seems that it was not; because reprisals can not lawfully be granted except against those who are in fault, and fault does not appear to attach to the absent; and further because, when a man has a double capacity, as of origin and domicile, that which is favorable to him should rather be regarded, especially in a question of reprisals, which, though sometimes allowed, are yet never to be regarded with favor. Others, however, except from the rule the case of one who resides elsewhere, but contributes to public burdens in his state of origin, in his own person or through his family.

Bartolus, on Reprisals, question 7.

4. Whether one who is a friendly subject by origin, but is domiciled among enemies, should be regarded as an enemy subject?

At a time when the English and Venetians were on friendly terms with one another, an Englishman, who had been granted the right of reprisals against the subjects of the King of Spain, seized the goods of a Venetian who dwelt in Spain. Baldus, for the reasons mentioned in the preceding case, says they were seized unlawfully; Bartolus, on the other hand, relying on the distinction already alluded to, asserts that persons born elsewhere are, with other subjects, liable to reprisals if they contribute to public burdens with them. With him agrees Grotius, who writes that by the Law of Nations all the subjects of one who does a wrong are liable to retaliatory seizure, who are subjects in virtue of a permanent cause, whether natives or immigrants, but not those who are merely passing through or are there for a short stay. For retaliatory seizures were modeled on the burdens which are imposed for discharging public debts.

Bartolus, on Reprisals, question 7; Grotius, III, 2, § 7; Francis Niconitius, on Digest, XXIV, 3.

5. Whether those who are setting out to join the forces of enemies may be treated as enemies?

When the Lanuvians were proceeding to help the Latins against the Romans and, as soon as they had left their own gates, heard that the Latins had been beaten, and so returned immediately into the city, they were nevertheless informed by their governor that they would have to pay a great price for so short a march. And when Caius Pliny consulted the Emperor Trajan as to his decision in the case of two slaves who had been arrested among the recruits, whether the penalty of the law should be inflicted on them (a point on which he was himself in doubt), seeing that they had not yet been given a place in the ranks, Trajan replied that they should be punished, because the day on which they were approved demanded from them the truth of their origin.

Gentilis, however, took the opposite view in defense of certain Englishmen who were captured by the Dutch as they were on their way to regions belonging to the King of Spain, arguing that they should not be put to death. He maintains that it is wrong to regard as enemies those who have not yet been enrolled in the enemy's ranks, for this is required by the legal definition of soldiers; again the Englishmen were only conditionally intending to serve, that is, if the Spaniard should accept them; and where odious acts are in question a thing begun is not regarded as completed. The Lanuvians, he says, started in pursuance of a public decision, and thus became enemies as soon as assistance was publicly resolved on; and the slaves, of whom Trajan writes, were practically enrolled in the ranks on the day when they were approved, even though they had not yet taken the oath.

Gentilis, Spanish Advocation, I, 9; Pliny, Epistles, book X, 38, 39.

6. Whether foreigners who serve with subjects against a prince should be regarded as rebels?

When the Earl of Desmond and others had stirred up a rebellion in Ireland, Italians and Spaniards were sent to their assistance; who, after the Viceroy Grey had besieged them for some time, requested a parley. This was refused, because they had joined rebels with whom no parley could properly be held. Some, however, think that no one should be regarded as a rebel except one who has been a subject; others that all are rebels who engage in a rebellion, just as all are guilty of treason who abet a traitor, and all are guilty of the offense of piracy (even though in other respects enemies in the strict sense) who give assistance to pirates in a piratical ship.

Camden, Annals, 1580; Gentilis, Spanish Advocation, I, 10; Julius Clarus, Opinions, book V, on Treason, §§ 6, 7.

7. *Whether the subjects of the King of Spain in the Netherlands, with whom he consented to treat as free, obtained immunity from his dominion?*

When on behalf of Albert and Isabella, Archduke and Archduchess of Austria, to whom Philip, King of Spain, had transferred all his rights over the provinces of the Netherlands, it was proposed to the Estates of the United Provinces to treat on the subject of a peace or truce, the Estates utterly refused, unless they were first recognized as free and independent; whereupon the Archduke and the Archduchess stated, in their own names and in that of the Catholic King, that they were prepared to treat with them in that capacity, recognizing the United Provinces as free, and claiming no right of dominion over them; and this was declared by the first article of the treaty, which was also approved by the King of Spain. Afterwards, when the Estates of the United Provinces contended that they were free, not only by the personal abdication of the King, but by the acknowledgment of the King himself, and of the Archduke and Archduchess, the following answer was given on behalf of the Archduke and Archduchess and of the Spaniard: the form of words used did not confer absolute liberty upon the provinces, but invested the persons conducting the negotiations with a certain capacity to negotiate, in the absence of which it would have been utterly impossible for them even to contract with princes; the latter had put off their majesty, only so far as those negotiations were concerned; the word " as " was often used to mark a comparison, not a reality; there had been no cession of the royal rights and no resignation, these being acts which, even in the disposition of private estates or property, were only effected by certain forms and solemn process of law; and after the commencement of the negotiations the Estates had raised the question of a further renunciation of sovereign power, and the President Janin, the ambassador of the King of France, had reminded them that princes were forbidden to impair their sovereign rights to the prejudice of their successors.

Baudius and Puteanus, on the Belgian Truce; Patricius Armachanus, French War, II, ch. 5.

Section VIII.

Of Questions of Ownership between Belligerents.

Questions of ownership between belligerents include disputes about particular acquisitions, as when single things are captured from enemies, pirates, or others: and about universal acquisitions, when territories or kingdoms are invaded or subjugated.

1. Whether things captured from enemies become the property of the captors before they have been conveyed "within guard?"

The jurist Gaius says that things captured from enemies become the property of the captors immediately by the Law of Nations; but it has been determined by the nations that a man is to be deemed to have captured a thing, who so holds it that the other has lost all reasonable hope of recovering it, as when movables have been brought within the territory, that is, "within guard." It appears to follow that ships or other property at sea must be held to have been definitely captured only when they are brought into docks or harbors or the place where the whole fleet is assembled. For then recovery begins to be despaired of. But, says Grotius, it seems to be a principle of the more recent Law of Nations in Europe that such things should be deemed to be captured when they have been for twenty-four hours in the power of the enemy. Pierino Belli and Gentilis do not approve of this view.

Grotius, III, 6, §§ 2, 3, 4; Belli, III, § 11; Gentilis, Spanish Advocation, I, 2.

2. Whether things captured from enemies and brought into friendly territory should be restored to the former owners?

Some Spanish ships, captured by the Dutch, were brought into English harbors; whereupon the Spaniards appealed to the Admiralty Court of England and demanded restitution of the ships and their cargoes, on the ground that the right of postliminium, by which things are restored to their former owners, holds, not only when a thing reaches its own territory, but, as the jurist Pomponius says, if it comes into an allied or friendly state, or to the country of an allied or friendly king, because there it first begins to be protected by the name of the state; and the King of England was at that time friendly to the King of Spain. Grotius, however, following Gamma, says that the rule does not apply without qualification to friends or allies with whom relations of peace exist; but only to those who espouse the same side in a war. For among those who

are friends, but do not espouse the same side, persons captured in war do not change their status, except by special compact. Thus in the second treaty between the Romans and the Carthaginians it was agreed that prisoners of the Carthaginians, belonging to peoples friendly to the Romans, who came into ports subject to the Romans, might be claimed as free; and that the friends of the Carthaginians should have a like right.

Gentilis argues against Gamma and Grotius, that there is a right of postliminium in any friendly state, which does not belong to the enemy's side, on the ground that the law speaks not only of an ally, but also of a friend, and that the principle of the law requires that postliminium should be possible whenever a man is in safety. The provision in the treaty between the Romans and the Carthaginians is not decisive against this view, because treaties often contain superfluous provisions on matters which would otherwise be legally secured.

Grotius, III, 9, § 2; Gamma, Decisions, 384; Gentilis, Spanish Advocation, I, 1, 2; Besold, on the Law of Territory, ch. 3, § 4.

3. Whether things should be regarded as captured which could not escape from pursuers?

Some Maltese galleys, pursuing certain pirates, pressed them so hard that they were undoubtedly about to fall into the hands of the Maltese and had abandoned all hope of escape, when they were thrown ashore on the island of Corsica and captured by Corsicans. A question arose whether they ought to be restored to the Maltese; and Cephalus advised that a thing was said to be captured when it was impossible for it to escape capture, and concluded that the pirates ought to be restored to the Maltese, or else that the Corsicans were bound to pay their value; because they were the cause of the Maltese not attaining the end and reward of their labor.

Alciati agrees in the case of wild animals unable to escape; but Louis Molina says that ownership and possession belong to him who actually captures, since the blow struck by another is not sufficient to make him the captor. But if the blow of one was the cause of the other's capture, the striker certainly has a right, in virtue of having produced the cause, to have some profit and right in the thing captured.

Cephalus, Opinions, 36; Gentilis, Spanish Advocation, I, 4.

4. Whether the goods of those whose towns or lands are occupied by enemies may be plundered?

In the war between the Emperor Charles the Fifth and Francis King of France, the French occupied many towns in the dominion of the Duke of Savoy. Thereupon the imperial troops seized the opportunity and plundered the goods of subjects of the Duke of Savoy as if they had been subjects of the King of France, on the ground that they appeared

to take the side of their enemies and to afford them aid. Pierino Belli, however, strongly disapproved of this conduct, because the Piedmontese, although supporting the French in their territories, and also affording them aid, must be presumed to have done so not voluntarily or from a desire to favor the French rather than the Imperialists, but under the compulsion and fear of those whom it was neither easy nor safe to resist; but compulsion and fear excuse fraud and negligence, and ought to give immunity from punishment or loss.

Belli, II, § 5.

5. Whether the goods of friends may be captured on an enemy ship?

It is commonly said that if a ship is liable to capture, the goods are also held liable. Grotius, however, says that the maxim that things found in an enemy's ships are deemed enemy property ought not to be accepted as though it were a certain rule of the Law of Nations, but ought merely to raise a presumption, which may still be rebutted by valid proofs to the contrary; and in Holland, in the year 1338, when war was raging with the Hanseatic League, it was so decided in a full Senate and passed from the decision into the law.

Grotius, III, 6, § 6; notes to III, 1; Consolato del Mare, ch. 237.

6. Whether the ships of friends carrying the goods of enemies may be made prize?

When some merchants of the Netherlands, adherents of the King of Spain, were in the habit of shipping cargoes secretly to Spain in English ships, the inhabitants of Zeeland, who pursued them with bitter hostility, in their indignation captured certain English ships engaged in this practice, and secured their condemnation by the judges of the Admiralty as lawful prize. The English complained of this, and succeeded in getting some ships of the Zeelanders which had put into English ports detained, and their captains imprisoned by way of reparation. The Prince of Orange, however, appeased the Queen, and it was agreed to restore the ships and persons captured on each side. The opinion of the judges is supported by the rule of the civil law by which a ship is forfeit, in which illicit cargoes are carried with the knowledge of the owner. And there is a French edict which enacts that if enemy goods are found in the ship of an ally, even the ship is lawfully confiscated. But it is more equitable to release the ships of a friendly power after removing their cargoes, unless they carry contraband, and by the Consolato del Mare, in which the law of the Mediterranean is contained, one who seizes enemy goods in a friendly ship is bound to pay freight for that part of the voyage which the ship has performed.

Meteranus, Belgian History, 1576; Morisotus, II, 10; Gentilis, Spanish Advocation, I, 28; Grotius, notes to III, 1.

7. Whether the property of friends may be intercepted on its way to enemies?

Paul Dzialine, an ambassador of Sigismund, King of Poland, after handing a letter to Queen Elizabeth, after a custom unusual in England, retired to the lower part of the chamber, keeping his face turned towards the Queen. There in a loud voice he complained in the Latin tongue that in violation of the Law of Nations trade with the Spaniards had been forbidden by the Queen, and under color of such prohibition goods had been seized for her treasury. Accordingly he demanded that the goods which had been taken should be restored and free navigation to Spain permitted henceforth; otherwise, he declared, the Polish King would proceed to safeguard the interests of himself and of his subjects and cause those who were the authors of the injury to return to their senses.

The Queen immediately rebuked the fellow's audacity in these words:

"How have I been deceived! I looked for an ambassador; I have found a herald. I can not sufficiently express my amazement at such audacity and temerity. If your King gave you any such instructions, which I very much doubt, I think it must be because, being a young man, and not having been advanced to the throne by the ordinary succession of blood, but by election, he does not yet understand the proper handling of affairs of this kind, nor our own relations with his predecessors. You speak of the Law of Nations; but you ought to know that when kings are at war it is lawful for one side to intercept reinforcements or supplies sent to the other, and to see that no harm comes to them from that source. This, we maintain, is agreeable both to the Law of Nature and to the Law of Nations, and it has been the practice not only of ourselves, but also of the kings of Poland and Sweden in their wars with the Muscovites."

So spake the Queen. With this agrees the action of Demetrius, who, when he occupied Attica with an army intending to create a famine in Athens, captured a ship and its pilot, who was preparing to take in corn; and the Carthaginians captured certain Romans who brought supplies to their enemies, but gave them up on request. Grotius thinks that we should draw a distinction in the things carried; some things, such as mere articles of luxury, have no use in war, and this class gives no cause of complaint; others have use only in war, such as arms, and persons who supply such things to enemies are regarded as taking their side; and there are other things which have a use either in war or apart from it, such as money, supplies, or ships, and these may be intercepted if their carriage may hinder a surrender which is expected.

Camden, Annals, 1597; Grotius, III, 1, § 5, and in the notes to that passage; Gentilis, I, 21; Spanish Advocation, I, 20.

8. Whether when a particular article is contraband the material out of which that article is made may be intercepted?

When arms or ships have been declared contraband, a question is raised whether if iron, out of which arms are made, or planks or timber, out of which ships are built, are carried, they are liable to forfeiture. This is doubtful, because we can not safely argue from the finished article to the material, and the scope of a penal statute or edict ought not to be enlarged.

On the other hand, it is decided that when there exists the same reason for prohibiting the material and for prohibiting the article, the same rule should apply to both, chiefly to guard against fraud. Hence the Senatusconsultum Macedonianum, which forbids a loan of money to be made to a filius familias, is extended to cover some things out of which money can be made, when the contract is tainted with fraud. It is the same when a prohibition is at common law, as for instance when the civil law forbids not only arms but also iron to be carried to the enemy; and the canons which do not allow galleys, that is to say, triremes, to be conveyed to the Saracens also forbid the conveyance of galley-stays, that is, the timber and planks out of which triremes are built.

Guido, Decisions, 371, § 2, Things which may not be exported.

9. Whether when a particular thing is contraband, an accessory of that thing may be captured on its way to enemies?

In a war between the Emperor and the King of France, the generals agreed that certain things might pass freely from side to side, arms of every kind being excepted. It happened that a certain merchant, on the Imperial side, among some licensed wares carried a hundred, or fifty, scabbards for sheathing swords, which were intercepted by the French because scabbards are as much a part of an enemy's equipment for military operations as swords. This, however, appeared hard, because wool and flax, which are necessary for soldiers' clothes, are not reckoned as contraband, and scabbards are only the garments of swords. The merchant, however, as Pierino Belli records, lost his wares, by camp-justice, he adds, which is often administered far away from books and not infrequently on slight consideration.

Belli, on Military Things, IX, 26.

10. Whether contraband goods caught on the way to a hostile place may be captured as destined for enemies?

A Genoese ship, laden with a cargo of great value, was captured on its voyage, charged with carrying arms and contraband goods to the Turks. Roderigo Suarez advised that the ship and goods ought to be restored, because the things had not been carried to the enemy and because there was no clear proof that the ship was bound for a Turkish

port. The jurists say that a judge must presume that a person intended to go to a prohibited place if he has been found on the confines of that place and off the route to the place to which he alleges that he was bound; and that one captured on the way is liable to be punished just as if he had reached the hostile place, because it is important that contraband goods should not be carried. Nicolas Boerius also mentions that a ship carrying contraband goods was captured on the voyage and condemned as lawful prize. Others draw a distinction as follows: if the penalty is referred to a verb in the past tense, as for instance, " if any one shall have carried," then, they say, the completed act is necessary; but if to a verb in the present tense, as for instance, " if any one carries " or " is found to be carrying," then it is sufficient that he has been caught on the journey.

Bartolus, on Code, XI, 1, 7; Boerius, Decisions, 178; Baldus, on Code, IV, 33, 3.

11. Whether those to whom leave has been given to capture persons on their way to enemies, may capture persons returning from enemies?

By a Spanish constitution, if clerks are caught bearing arms, they may be deprived of their arms by the secular judges; but if it is merely shown that they have borne arms, they are immune from those judges. It appears, however, that going and returning should fall under one and the same rule; though some distinguish the two by reference to the intention and purpose of the person giving the order. That is to say, if the right of capture has been granted in order to reward those who prevent the carriage of contraband goods, only those are entitled to the booty who effect the capture before the goods reach the enemy; but if the object is that the loss may deter others from attempting the carriage, then even the goods of those who have completed the conveyance may be captured as they return.

Code, VI, 1, 3; Bartolus, on Digest, XLI, 2, 3, 3.

12. Whether the nicotine herb, commonly called tobacco, may be conveyed to enemies?

At the time of the war between the King of the Spains and the Estates of the United Provinces of the Netherlands, certain English merchants despatched a ship laden with the nicotine herb, or tobacco, to a port of the Estates of the United Provinces; this ship with its cargo was intercepted by subjects of the King of the Spains on a charge of carrying contraband to the enemy. The English merchants sought to obtain restitution of the ship and cargo in the maritime court of the King of Spain. There the subjects of the King of Spain argued that the nicotine herb should be regarded as a food; at any rate by its use the consumption of food was protracted, and it ought to be confiscated on the same ground as salt, by which food is preserved from decay. On behalf

of the English medical evidence was offered, by which it was established that tobacco smoke is not nutritious, and the opinions of jurists were cited who asserted that although it might be that the goods of subjects could be made liable to forfeiture by mere parity of reasoning, yet those of foreigners and friends were not liable to confiscation unless declared contraband in express terms. Judgment was given in favor of the subjects of the King of Spain in his own maritime court, but the Englishmen appealed to their own King, who, after holding an examination of the case and taking the opinions of jurists, granted letters of reprisal to the English merchants against the subjects of the King of Spain, to recover and repair the losses which they had suffered.

Acts and Proceedings in the Court of Admiralty of England.

13. Whether innocent goods are liable to forfeiture on account of illicit goods?

Pierino Belli relates that a merchant who was carrying a number of scabbards for swords, together with other wares, had to forfeit not only the scabbards but the other wares also, which he redeemed for six hundred marks, on the pretext that innocent goods are liable to forfeiture on account of illicit goods. The jurist Paulus says that if anything is unlawfully put on board a ship in the presence of the owner, not only the cargo but the ship itself should be claimed for the treasury. Others distinguish between the case where the innocent and the illicit goods which form part of the same cargo belong to the same owner and that where they belong to different owners, and say that in the former case all are confiscated, in the latter only the property of the owners of the illicit goods.

Digest, XXXIX, 4, 11; Code, IV, 33.

14. Whether because sailors do not lower their sails to a war-ship of another prince, the ship may be captured as prize?

The captain of a French ship of war meeting a Hamburg ship returning from Spain, ordered the sailors to lower their sails; and when they refused to do so he attacked and compelled them, and taking the ship into France claimed that it should be adjudged to himself and his companions as prize lawfully captured. He argued that it concerned the dignity of a prince that the ships of other nations should show due respect to his ships carrying his flag; and that it was enacted by royal edicts that other ships should lower their sails to the King's ships on pain of capture. On behalf of the men of Hamburg it was argued in reply that in Spanish waters, where the French King claimed no right of empire, no respect was due to his ships; that the French edicts did not bind strangers, especially strangers who were ignorant of them; and that the people of Hamburg were allied with the Spaniards as they were with the French,

and that it was lawful for them to trade freely in Spain. Louis Servin, the royal advocate, states that the judge of the inferior court pronounced the capture of the ship lawful, but that the judges of the superior court, who thought the rigor of the law should not be enforced against foreigners and friends, pronounced for its restitution.

Servin, II, 11; Selden, The Closed Sea, II, 26.

15. Whether things recovered from pirates should be restored to the former owners?

It is clear that things captured by robbers and pirates never pass into their ownership. Javolenus expressly says that if a slave has been stolen by robbers, although he afterwards falls into the hands of enemies, and on their defeat in war is sold by the victors, yet the buyer can not become his owner by usucapion.

Ayala, however, inclines to the opinion that a thing which has been carried off by irregular enemies, and has afterwards come into the control of regular enemies, and then been recovered by the military prowess of the citizens or bought back in the way of trade, should not be restored to its former owner. He admits the validity of the opinion of Javolenus in the case of a slave, because of the right of postliminium, but not in other things to which that right does not extend.

Gentilis defends the opposite view and does not approve of the distinction between slaves and other property, since the principle of the law covers all things which have been stolen; and further other things (except certain things which can not be lost without disgrace) admit of postliminium just as much as slaves. With Gentilis agrees Grotius, who asserts that the Law of Nations does not allow robbers or pirates to alter the ownership of a thing; and for this reason the Athenians wished to treat Halonnesus, which had been wrested from them by robbers, and from the robbers by Philip, as restored and not given to them by Philip. Nevertheless he thinks that it is agreeable to natural law that one who has bought back a thing at his own expense should receive such a sum as the owner himself would of his own accord have spent to recover the thing.

Ayala, I, 5, § 40; Gentilis, Spanish Advocation, I, chs. 12 and 15; Grotius, III, 9, § 16.

16. Whether in the sack of a city he who first entered a house, or he who afterwards caught a man hiding in the house, ought to receive the price of ransom?

When a certain city, as Pierino Belli relates, was being sacked, an ensign entered a monastery with his fellow-soldiers and plundered it, as military license allowed him to do. There was in the monastery a certain nobleman hidden in a secret cell, who, on the information of his

servant, fell into the hands of a captain, who entered the monastery afterwards, before the nobleman was found by the ensign. A question was raised as to which of them had the better right to the price of ransom. On behalf of the ensign it was argued that as he had been the first to enter the monastery, whatever it contained belonged to him, since the possessor of what contains is also regarded as the possessor of what is contained; and that, according to military custom, he who seizes a house is deemed to have seized everything in it. For the other side it was argued that things which are not apprehended, either physically or by the eye, can not be acquired by mere intention; and according to the opinion of the jurists, one who possesses an estate certainly does not possess a treasure which, unknown to him, is buried in it; and as to military custom, a private house is very different from a monastery because of the many different habitations contained within the walls of the latter. Pierino Belli records that judgment was given in favor of the right of the captain.

Belli, IV, 15; Digest, XLI, 2, 3, 3; and 2, 8; Gentilis, II, 16; Alciati, Opinions, V, 41.

17. Whether one who provides a soldier with a horse ought to share the booty captured by him?

The commander of a troop of Spanish horse met one of the men of his troop as the trumpet was sounding for battle. The man complained that he had lost his horse in a fight a few days before, and therefore could not take part in the coming battle; whereupon the officer bade him mount one of his own horses and follow him. The soldier mounted the horse and, amid the rout of the enemy, fell in with the general of the hostile army himself, whom he made prisoner and delivered over to the general of the Spanish army, who obtained from the captive twenty thousand gold pieces. The officer maintained that part of the price of this ransom was due to him, because the soldier had fought on his horse and could not otherwise have taken part in the battle.

Pierino Belli assures us that when he was at Brussels, at the court of the King of the Spains, he was consulted on this question and advised that the officer had on his side equity, which is specially regarded among soldiers, whose disputes should be decided by consideration of what is equitable and right; and therefore a man is bound beyond the terms of his agreement to do whatever one man ought fairly to do for another. The officer had also pleaded the camp-custom, that one who lends a horse should be admitted to share in the spoils. Belli, however, says that when he withdrew from the court he left the dispute undecided; but he afterwards heard that judgment was given against the officer, whether rightly or wrongly he does not clearly say.

Belli, IV, § 8.

18. If a prisoner is captured a second time in a battle, to whom is the price of his ransom due?

In a battle between troops of the Emperor Charles the Fifth and Francis, King of France, a French nobleman fell into the hands of an Imperial soldier, to whom he handed his sword as a token of surrender, and promised that he would not make his escape, but he remained mounted on his own horse, armed with a club. Shortly afterwards he fell in with another Imperial horseman, who wrested the club from him, and, loosing the reins on the horse's neck, led him off as a prisoner. A French force then coming up, the troop of Imperialists took to flight; and the bridleless horse followed the flying Imperialists of its own accord, until it reached the Imperial infantry, who checked the flight of their comrades, drove back the enemy, and captured the prisoner on the run-away horse. A question then arose as to whose prisoner he should rightly be considered; that of the first captor, to whom he had given his parole and his sword; or of the second, who had deprived him of his club and of the control of his horse; or of the foot-soldier, who had taken him prisoner for the third time as he was careering about.

Pierino Belli said that judgment ought to be given in favor of the foot-soldier; because as regards the first and second captors, it appeared that he recovered his original liberty by the onrush of the French and the rout of the Imperialists. Baldus, in a nearly similar case, distinguishes the cases where the first captor detains the prisoner in fact and where he trusts to his parole; and says that if he detains or leads him off for some time he is in fact and solely the prisoner of the first captor; but if the first captor does not detain him or lead him off, but releases him on parole, his words and promise do not prevent him from being taken prisoner by another. Pierino Belli, however, regards the distinction between one who is actually kept under personal restraint and one whose parole is accepted as immaterial; in either case, he says, he can not be taken prisoner by another, because one who is bound by parole is no less held in the custody of his captor than if he were under personal guard or in fetters. This rule, however, only holds good among soldiers serving on the same side, and when there is a presumption that the first captor retains possession of his prisoner by intention. There is nothing to prevent one who has been recaptured by his own side, that is, by the party opposed to the captor, or who has been abandoned, which is to be presumed from the act of flight on the part of his captors, from being taken prisoner afresh by another.

Belli, IV, 11; Baldus, on Code, VIII, 48.

19. Whether a prince taken prisoner by a private soldier may be detained by him?

When Edward the Third, King of England, was besieging Calais, and David, King of Scotland, had invaded England with a large army, an army which was collected under the command of the Queen utterly defeated the Scots in a pitched battle. Their King was taken prisoner by a gentleman named John Copland and taken to the camp of which he was in charge. When the Queen heard of this, she wrote a letter to Copland, commanding him to bring the captured King to herself, to which Copland replied, that he would yield him to no one, man or woman, except the King. Accordingly the Queen in a letter to the King complained of Copland's contumacy; and the King sent for him to Calais, which he was besieging. Copland having presented himself, and excused his action, the King pardoned him and granted to him and his heirs lands to the value of five hundred pounds, but nevertheless he bade him hand over his royal captive into the hands of the Queen; which Copland on his return to England did, begging the Queen also not to be angry with him, with all gravity and submission.

Froissart, Chronicles, book I.

20. Whether a city captured in war loses its rights?

When Alexander overthrew Thebes, he found account books in which it was recorded that they had lent the Thessalians a hundred talents. This debt Alexander remitted, because the Thessalians had taken the field with him. Afterwards when the Thebans were restored by Cassander, they demanded the loan from the Thessalians and instituted proceedings before the Amphictyons.

Hotman argues on behalf of the Thebans that Alexander was not a universal successor to the whole estate of Thebes, but a particular successor to particular things, because conquerors only become owners of what they actually lay hands on; and also that the Thebans had recovered their former right by right of postliminium.

Gentilis, however, urges on behalf of the Thessalians that Alexander ought to be considered the universal successor of the Thebans, since Thebes was overthrown and in a sense suffered death, an opinion which had already been formed by Ayrault, who reviews all the arguments of Hotman and thinks that the Amphictyons gave judgment for the Thessalians.

Hotman, Famous questions, 5; Gentilis, III, 5; Ayrault, I, 9; Ayala, I, 5, § 41; Grotius, III, 18, § 4.

21. Whether Ferdinand, King of Spain, justly occupied the Kingdom of Navarre after driving out its king, John d'Albret?

When Louis the Twelfth, King of France, was attacking the Papal States in Italy, Pope Julius the Second urged Ferdinand, King of Spain, and Henry the Eighth of England, who claimed the Duchy of Aquitaine, to attack the Frenchman. In order that their forces might meet, it seemed convenient to the Spanish King to lead his army through Navarre, and he sent envoys to King John d'Albret to ask his permission. Failing to obtain it, he attacked and occupied the Kingdom of Navarre, its King, who was unprepared with troops and supplies, retreating with his wife and children to Bearn, on the near side of the Pyrenees.

Ferdinand's occupation of the Kingdom of Navarre is defended on the ground that a passage through the Kingdom which by the Law of Nations ought to have been granted him had been refused; for a similar reason Moses destroyed the cities of the Amorites, and Judah those of the Ephronites; moreover John, King of Navarre, had been excommunicated by the Pope and deposed from his throne, which had been transferred to the Spaniard, because he adhered to the side of the French who were enemies of the Roman Church.

On behalf of John d'Albret it is maintained that he owed allegiance to the King of France and that a great part of his possessions lay in France beyond the Pyrenees, which he would have lost by taking the side of the Spaniard; the Spaniard demanded not only permission for the passage of his army, but also, in order to insure its safety, the surrender of citadels and fortified places, which it would have been dangerous to give up to an armed force; and the censure of the Roman Pontiff, being without cause, was as unjust as the transfer of the throne without authority was foolish.

Similarly when Pope Alexander the Sixth presented the Western Indies to Spain, Attabaliba, King of Peru, said that one who so generously gave away other people's possessions must be signally foolish and impudent.

On the Spanish side: Antonius Nebrissensis, Navarran War; John Lopius, Claim to the Kingdom of Navarre; Antonius de Padilla, on Code, III, 34, 11. Against the Spanish contention: Charles du Moulins, Customs of Paris, § 41; Bodin, I, 9, § 120; Benzonus, History of the New World, III, ch. 3.

22. Whether Philip the Second, King of Castile, justly ejected King Antony from the Kingdom of Portugal?

Emanuel, King of Portugual, had sons, John, Henry, Louis, Edward, and a daughter Isabella. John succeeded Emanuel, but as he had no issue the throne passed to Henry the Cardinal. He, being old and childless, instituted a public trial of the question of the succession, in which appeared Antony, son of Louis, but regarded as illegitimate; Ranuccio Farnese, Duke of Parma, a grandson of Edward, through his daughter Maria; Catharine, Duchess of Braganza, daughter of the

same Edward, and Philip, King of Castile, a son of Isabella. Inquiry was made into the birth of Antony, and a decision given against him, adjudging him a bastard. Henry died before arriving at any decision on the succession, and the people elected Antony, son of Louis, as their King, and had him crowned. Philip the Second afterwards sent an army under the Duke of Alva, drove Antony out, and brought the whole of Portugal under his sway.

For Antony it was urged that Henry's decision adjudging him a bastard had been disapproved by the Pope; his father Louis had contracted a lawful, though secret, marriage with his mother, which for various reasons had never been made public, and this had prevented Henry the Eighth, King of England, from betrothing his daughter Mary to Louis; but even if Antony's birth was not quite legitimate, had not many natural sons succeeded their fathers, not only in Portugal, but in Castile and other countries? Moreover, if the male line of the royal family failed, the people of Portugal contended that the right of choosing a king passed to them.

For Philip it was argued that Antony's illegitimacy had been clearly proved; Henry's decision only failed to meet with the Pope's approval because the King, disregarding the Pope's authority, had given judgment in a matrimonial case; the alleged right of Antony was disapproved by every other member of the royal family; the people had no right to choose a king so long as any of the royal blood survived; and before Philip invaded the kingdom he took the opinions of jurists and theologians and adjured them in God's name and upon their honor to tell him truly what were the merits of his claim, and it was by their advice that he had asserted his claim to the throne.

Camden, Elizabeth, 1582. On the side of Antony. Declaration of the succession to the throne of Portugal (Antwerp, 1582), ch. 2; Discourse of the King, Don Antony, at Paris, 1607. On the side of Philip: Conestaggio, on the Union of Portugal and Castile; Antony Viperanus, on the Portuguese claim.

23. Whether the Portuguese justly transferred the Kingdom of Portugal from Philip the Fourth, King of Spain, to John, Duke of Braganza?

In the trial which King Henry instituted about the succession to the throne of Portugal, Ranuccio Farnese, Duke of Parma, the son of Mary, elder daughter of Henry's brother Edward, contended that as a matter of pure and simple law a king left as many rights of primogeniture as he did sons. When the first ended the second succeeded; when the second ended, the third; and so on; and accordingly as the lines of John, Henry, and Louis had failed, he as the son of Mary, Edward's elder daughter, ought to be admitted to the succession before the other claimants.

On behalf of Catharine, Duchess of Braganza, own daughter of Edward, it was argued, that if her father Edward had been alive at the time of Henry's death he would undoubtedly have been heir to the

throne; that Edward being dead the same right belonged to her as his surviving daughter; that she was nearer in degree than Ranuccio and ought to be preferred to Philip, who was the son of a sister, she herself being the daughter of a brother.

On behalf of Philip, King of Castile, son of Isabella (daughter of Emanuel) and the Emperor Charles the Fifth, it was argued that Ranuccio, Edward's grandson, and Catharine, his daughter, relied on the benefit of the right of representation, which was nothing more than a fiction of the civil law and did not apply to royal successions; that he, Philip, was to be preferred to Ranuccio as being nearer in degree, to Catharine as being of the nobler sex, and to both by priority of birth.

The Portuguese grew tired of a Castilian régime, and throwing off their allegiance to Philip the Fourth (grandson of Philip the Second, who obtained the throne by force of arms), raised John, Duke of Braganza, son of Theodosius and grandson of Catharine, to the throne.

The Castilians complained of this action as unlawful and wrong, on the ground that Philip the Second obtained the crown not only by right of blood, but also by that of lawful conquest; that all the Portuguese were bound by oaths to obey the rule of him and his heirs; and that the Duke of Braganza owed fealty to the present King for his duchy and was guilty of the basest ingratitude in turning his military power in the kingdom against the King.

The Portuguese on the other hand urged in their defense that Philip the Second obtained the crown by no right of blood, since the fundamental laws of the Kingdom did not permit foreigners to succeed to the throne; that a kingdom subdued by force of arms might win its liberty in like manner; that a possessor in bad faith can not acquire a title by prescription by any length of time, certainly not by sixty years; that the Kings of Castile ought not to expect the Portuguese to observe the oaths by which they promised obedience, seeing that they themselves did not observe the sworn promises made at the time of their inauguration, as was obvious when Margaret, Duchess of Mantua, was appointed regent of the kingdom, who, although of the royal blood, was still not within the specified degrees; when matters affecting the Kingdom of Portugal were not administered by a council of Portuguese in Spain, as they ought to have been, but at the will of the Castilians; and when Castilians were summoned to the Supreme Council of Portugal and even to the Councils of the Royal Estates. As to the Duke of Braganza, his promise of fealty to the King did not impair his own rights, nor ought he for the sake of the King's favor to have neglected his duty to his country; and many other arguments were used, which are reviewed by the author of " Lusitania Liberata."

For Ranuccio, Opinion of the jurist Patavinus; for Catharine, Opinions of jurists of Bologna and Perugia; for Philip, Michael de Aguirre; for the Portuguese, Antonius de Souza, Portugal Liberated, and the authors on both sides referred to by him.

24. Whether Ferdinand, after being deposed by the Bohemians, justly occupied the Kingdom by force of arms?

Ferdinand, son of Charles, Archduke of Austria, and cousin of the Emperor Matthias, was appointed successor to the throne of Bohemia at a meeting of the Estates at Prague, in the month of June 1617, and was crowned in the month of July. Afterwards, on the death of Matthias in the following March, the Estates deposed Ferdinand and elected Frederick the Fifth, Elector Palatine, as King.

The Estates of Bohemia maintained that the deposition was lawful because the right of free election belonged to them, as they proved by instances extending from A. D. 345 down to the time of the Emperor Matthias. The appointment of Ferdinand was subject to the condition (which he secured by writing) that he should usurp no authority during the lifetime of Matthias and that (as he bound himself by oath) he should make no attack upon the liberties and privileges of the Kingdom. Ferdinand, however, had interfered in the administration of the Kingdom during the lifetime of Matthias, had attempted to exterminate the Protestant religion, had brought in foreign soldiers to oppress the native Bohemians, and to the perpetual prejudice of the right of free election had entered into a compact with the Spanish King, the keenest champion of the Papal religion, for the transfer of the Kingdom. On behalf of Ferdinand it was contended that the right of election which the Bohemians enjoyed had always been confined to the families of the archdukes and kings, and that it had always been regarded in that Kingdom rather as a right of succession than of election; he had been legally elected and had done nothing to justify deposition; during the lifetime of Matthias he had done nothing except on the instructions of Matthias in order to compose disturbances; he had taken no action on religious grounds against those who professed the Augsburg Confession (who alone were tolerated in Germany); the Bohemians in the first instance took up arms against the Emperor Matthias and took advantage of his failing health to seize the fortress of Prague together with the scepter and crown of Bohemia and appointed directors to govern the kingdom; and the compact with the Spaniard as to the succession to the throne had been entered into with the consent of the Emperor Matthias and his own brothers (whose interests were concerned) for the public good, with a view, that is to say, of avoiding a war with a most powerful prince of the House of Austria, who was asserting a claim to the succession.

For Ferdinand, the Hereditary Right of Austria; Goldastus, on the rights of the Kingdom of Bohemia; for either side in various passages, Litura. On the other side, Information in the chancellery of Anhalt; Criticism of Litura; evidence of the Elector in the Bohemian cause.

25. Whether the Emperor Ferdinand justly ejected Frederick, Elector Palatine, and his children from the Electorate and its dominions?

The Emperor Ferdinand the Second condemned Frederick the Fifth, Count Palatine, for treason for having taken upon himself the government of Bohemia, deprived him of the Palatinate and the Electorate, and transferred his dignities and dominions to the dukes of Bavaria.

The following questions were raised: (1) Whether the Emperor could proscribe him without the consent of the princes of the empire; and (2) Whether he lawfully deprived the children as well as the father of the dignities and dominions. Those who take the Emperor's side maintain that he acted lawfully on the following grounds. An injury inflicted on Ferdinand, King of Bohemia, might be restrained by the same Ferdinand as emperor, since one who bears two personalities is not prevented from exercising the right and privileges attaching to each. In an obvious and notorious case there was no necessity to call together the Council of Estates or Princes; and the other Electors, at any rate the majority of them, had ratified the proscription.

As to the second question, not only at civil law (as Arcadius and Honorius enacted) are children deprived of the paternal inheritance and succession for the crime of treason, but by the custom of other nations (Italy, France, Spain, and England), for a crime committed by the father, the descendants lose their fiefs, since a tacit contract is deemed to enter into the delivery of the fief, by which the lord stipulates for the right of forfeiture, not only against the donee himself but also against all persons substituted to him, in the event of an offense involving forfeiture being committed.

Those who take the side of the Count Palatine argue otherwise. No law, they say, allows a man to act as judge in his own cause; by the constitutions and capitulations of the Roman monarchs, nay by those of Ferdinand himself, the Emperor was bound to summon a Council of Estates or Electors in the more serious cases; the princes of the Empire, by privilege, were subject to the judgment of none save their peers in cases which concerned their dominions or dignities; the Electors who afterwards offered their assent to the proscription were not assembled as a college, but gave their votes separately as individuals; and a judgment void in law was incapable of confirmation. As to the children of Frederick, the jurist Alphenus had given an opinion that one who had lost his civil rights deprived his children of no other part of their rights except what would have come to them from himself, but those which were not conferred by a father, but by nature, the state, or the family, remained to them unimpaired; the German fiefs differed from those of other kingdoms, inasmuch as in Italy, France, and Spain fiefs were part of the patrimony, and their holders might alienate, lose, and divert them from their

descendants; whereas in Germany fiefs, especially those of illustrious dignities, by provision of the fundamental law and the observance of immemorial custom, belonged to children and agnates in the sense that predecessors could by no act take away or transfer the right vested in them, since they descended in virtue of the original grant and investiture, not of inheritance from the father, and were benefices of the family, not of the father, and their holders had a right to them for life only; and so they were neither liable to be confiscated for treason, nor lost to the prejudice of the children by a regular war. This, it is said, was the decision given in favor of the children of the Marquis of Montserrat concerning certain feudal castles captured by the Duke of Bavaria and abandoned by their father for the sake of peace. And other arguments agreeable to the authorities and opinions of the most eminent jurists were adduced on the same side.

For the Emperor, the Imperial Ban, Imperial Justice; for the Count Palatine, the book of Nullity; the Mirror of the Ban; John Joachim à Rusdorf, Claim to the Palatinate.

26. Whether the King of Sweden justly invaded Germany with an army?

When the Emperor Ferdinand the Second had secured the coronation of his son Ferdinand as King of Hungary and Bohemia, the princes of Germany, especially the Electors (as Baptista Burgus records), suspected that he intended also to raise him to the throne of the Romans; and accordingly, in order to prevent the Austrians from establishing a hereditary succession to the Imperial throne, the Spaniards from interfering unduly in the affairs of Germany, and the adherents of the Reformed Religion from being driven out of the German dominions, as they had been from Austria and Bohemia, they formed a plan to vindicate the liberties and privileges of the empire and to safeguard their religion by force of arms. Not being able to agree on any German leader, because no German would yield to another, and it being dangerous to levy soldiers in Germany under the shadow of the Emperor's power, they thought the better plan would be to place the troops under some foreign prince, superior in rank and dignity to the Germans, above all the King of Sweden, a champion of the Reformed religion, a man trained in war from his cradle, never defeated, and one who had quarrels with the Emperor. So promising him arms, money, and all necessaries, they enticed the King into their country, in order that he might make war in Germany at the risk of others for his own glory.

The King of Sweden, Gustavus, however, in order that a lawful reason for his expedition might be published, issued a memorandum in Latin and German in which he enumerated the wrongs done to himself and his allies by the Imperialists; he had been treated with ignominy because he had raised the siege of Stralsund, and assistance had been sent

to his enemies by the Emperor. As wrongs he mentions (1) That the Imperialists had intercepted a letter of his to the Prince of Transylvania, thrown the messenger into prison, and published the letter, putting a false construction on its contents, to his discredit. (2) That when negotiations for peace were proceeding between himself and the Poles, they had left nothing undone to put obstacles in the way of a peace, by voluntarily offering assistance to the Poles, and by allowing them to enlist soldiers and collect arms in Germany, whilst forbidding the Germans to take the field for the King. (3) They had plundered his subjects who put in on the German coasts for purposes of trade, robbing them of their wares and confiscating their ships. (4) They had expelled the Dukes of Magdeburg and fortified all the places throughout Magdeburg and Pomerania, maritime and inland alike. (5) They had built a fleet to infest the Baltic, and Wallenstein, Duke of Friedland, had been appointed admiral or maritime general to the prejudice of his own rights.

As regards the city of Stralsund, the facts were these: having refused to admit the army of the Emperor, which had laid waste the adjacent country like an enemy, until instructions should be received from the Emperor, it was being closely besieged; and rather than appeal to the King of Denmark for protection, because he at that time was regarded as an enemy of the Empire, it implored assistance from the King of Sweden, who thereupon collected troops, raised the siege of the city, and saved it from the ruin with which the army of Wallenstein was threatening it, and thus preserved it safe and sound for the Emperor. Again when he learned that negotiations for peace were to be instituted between the Emperor and the King of Denmark at Lubeck, he determined to send his own ambassadors thither to plead the cause of the city of Stralsund. The King of Denmark readily received them, but the ambassadors of the Emperor repelled them with the greatest insolence and bade them be gone not only from the city of Lubeck, but from any German soil, under threat of the direst consequences.

As regards the assistance furnished to his enemies, the Duke of Holstein had been sent with an army under the Emperor's own standards, to help the Poles against the King; and afterwards an army was led into Prussia under a field marshal of the Emperor.

A letter dealing with these points was addressed by the King of Sweden to the Electors of the Empire, before his soldiers invaded Germany, to which the Electors replied after four months. They expressed regret that the friendship existing between the King's Majesty and the Roman Empire had been violated by the enemies of peace, and declared that they did not believe that the Emperor in despatching an army to the regions of the Baltic entertained any designs against the King, but that his object was to crush the attempts of those who were in league with his enemies; and the people of Stralsund, had they shown their obedience to

the Emperor in acts instead of words, might have found a speedier relief against the wrongs of the soldiery from the Emperor's clemency than from external assistance. The Emperor could not well have deserted the King of Poland, who was his friend and cousin; nor was the affair of such moment as to warrant the kindling of fresh disturbances within the Empire, when the conditions of securing peace were not wanting. They therefore begged him to lay down his arms as soon as possible.

The King replied, in a further letter, that it was gratifying to him to learn that they regretted the wrongs inflicted by the disturbers of the peace; it would have been far more gratifying if they had proposed means of protection against them; he had no suspicion of the Emperor in the matter of the irruption of troops into the regions of the Baltic, but having suffered so many bitter injuries at the hands of the disturbers of the peace, he justly held them in suspicion; the people of Stralsund were prepared to state their case before impartial judges, as to which there was the less reason for hesitation since they had learned that their oppression was opposed to the decrees of the Emperor; the friendship and relationship between the Emperor and the King of Poland could not oblige him to submit to or to conceal a hostile attack; in conclusion he stated that he would withdraw his army from the territory of the Empire as soon as he had obtained satisfaction for the injuries inflicted on him.

Peter Baptista Burgus, Commentaries on the Swedish War; Philip Arlanibaeus, Swedish Arms; Letter of the King of Sweden to the Electors, pp. 4, 5, Letter of the Electors to the King, p. 36; second Letter of the King to the Electors, p 49

SECTION IX.

Of Questions of Duty between Belligerents.

Questions of Duty between Belligerents are questions which relate to the Law of Military Congress, Embassy, Convention, and Treaty.

1. Whether controversies between princes may be decided by single combat?

It is admitted that the duel is forbidden by the civil and the canon law. But philosophers and jurists sometimes approve of it and say that it is highly laudable for the purpose of avoiding a greater evil. Strabo records that it was an old custom among the Greeks to decide controversies by single combat, and in Virgil Æneas says that it was right that the quarrel between himself and Turnus should be decided in the same manner. So in Livy Metius says to Tullus, "Let us try a way of deciding, without great bloodshed on each side, which people is to rule the other."

Alciati, on Single Combat; Belli, II, § 15; Gentilis, III, 15; Grotius, II, 23, § 10; III, 20, § 43.

2. Whether a king in possession of a kingdom may be challenged by one who claims a title to the kingdom?

When René, Duke of Anjou, sent a bloody glove to Alfonso, King of Sicily, to challenge him to fight a duel for the right to the throne, some thought the conditions unfair because Alfonso had been invested with the crown and was in possession of the Kingdom, whereas René was merely asserting a titular right to the kingly honor. Others, however, considered the challenge lawful, since a crown does not increase dignity, and the possession seized by Alfonso could not weaken the right of ownership which René claimed to belong to himself.

Alciati, on Single Combat, ch. 30.

3. Whether the general of an army who is challenged by an enemy may honorably decline a duel?

When the Earl of Hertford, as commander in chief, led an English army into Scotland and was on the point of engaging the Scottish general and army, a herald was sent by the Regent of Scotland to propose terms of peace; and a trumpeter was sent in the name of the Earl of Huntly to announce to the Earl of Hertford that, if the proposed terms of peace did not meet with his approval, the Earl of Huntly was prepared, in

order to avoid the shedding of more Christian blood, to fight a duel with the Earl of Hertford, if he would agree, to settle the present controversy. The Earl of Hertford, however, after scornfully rejecting the terms of peace as being dishonorable, answered the trumpeter, that if the dispute had been between the Earl of Huntly and himself he would not have refused the offered duel, but since the controversy was one between the Kingdom of England and the Kingdom of Scotland it was not in his power to submit the settlement of so great an issue to his personal hazard; still less when he bore the public character of general of the army, did it become him to stoop to a combat with a man of private standing.

In the same way, when the general of the Alban army challenged King Tullus to a duel, Tullus refused on the ground that the quarrel was not between them, but between the states of Rome and Alba; and so the challenge of Sertorius by Metellus and that of Antony by Augustus were refused because it was not expedient that the generals of armies should commit themselves to the hazards of private soldiers.

Hayward, History of Edward VI.

4. Whether a soldier of inferior rank may challenge a soldier of superior rank to a duel?

When a common soldier in the army of the King of France appointed a day for meeting an ensign of cuirassiers in arms, the ensign objected that a common soldier was inferior to himself in rank, and therefore he was not bound to take up the challenge. But John James Trivulzio, a man well-versed in military discipline and at that time in command of the troops of King Francis, refused to allow this objection, on the ground that as the common soldier had entered his name on the military roll, and military service is a title to nobility, he was to be regarded as noble. A constitution of the Lombards, however, requires equality between challenger and challenged, and it is expressly provided therein that a count challenged by an inferior may fight "*per optionem*" or by proxy, just as persons of rank were allowed to make their defense by proctors in criminal trials.

Paris of Naples says that if a man is noble for four generations of ancestors, that is, from his great-great-grandfather downwards, he may challenge any one, even a duke. Alciati takes a different view, holding that as there is a definite order among degrees of rank, namely, first "illustrious," secondly "excellent," and thirdly "honorable," so one who belongs to the same degree of rank, although of an inferior quality, may not be repelled by another of the same degree; so that a count may not be refused by a marquis or a duke, because they are all of the same degree, that is to say, "illustrious"; and therefore one who is noble from his great-great-grandfather downwards, and who has passed his

life in arms, should be allowed to meet those who are " honorable," since theirs is the lowest degree and the inequality between them is slight.

Alciati, on Single Combat, ch. 33.

5. *Whether one challenged to a duel in a public war may decline on grounds of private friendship?*

When the Romans were making war on the Campanians on account of their revolt, a Campanian named Badius, a close personal friend of Titus Quintius Crispinus, by whom he had been generously and courteously entertained before the revolt, advanced beyond the outposts and bade Crispinus be summoned. When Crispinus received this message, thinking that Badius was asking for a friendly and intimate conversation, for he cherished the memory of their private relations even in the rupture of public treaties, he advanced a short distance from his companions. As soon as they came in sight of one another, Badius cried, " I challenge you to fight, Crispinus. Let us mount our horses, and in a clear field try which is the better man in war." To this Crispinus replied that neither Badius nor himself wanted enemies on whom to show their prowess, and that even if he were to meet Badius on the field of battle he would avoid him, so as not to stain his hands with the blood of a guest, and so turned and went away. The Campanian then actually began to taunt him more truculently and to cast in the teeth of an innocent man charges of knavery and cowardice more appropriate to Badius himself, calling him a " hospitable " enemy, and one who pretended to spare one for whom he knew he was no match. If Crispinus did not think that the rupture of public treaties had broken off their private relations at the same time, he, Badius the Campanian, then and there, in the presence of all and in the hearing of the two armies, renounced the friendship of Titus Quintius Crispinus and declared that no link bound them together, no tie between a host and an enemy whose country, whose gods of land and home he had come to attack. If Crispinus was a man, let him meet him in combat.

His own troops urged the reluctant Crispinus not to allow the Campanian to taunt him with impunity; and accordingly, merely delaying to ask the generals whether they would allow him to accept the challenge of an enemy in this irregular way, with their permission he took his arms, mounted his horse, and calling Badius by name summoned him forth to fight. The Campanian made no delay; and the combatants charged one another on horseback. Crispinus pierced Badius with his spear above the shield in the left shoulder, and as he fell wounded to the ground, leaped from his horse in order to despatch him on foot where he lay. But Badius before he could be overpowered, escaped to his own side, leaving his shield and horse behind. Crispinus, proudly showing the captured horse and arms and his own bloodstained lance, was conducted to the consuls amid the applause and congratulations of his men, and there highly complimented and rewarded with gifts.

Livy, book 25; Valerius Maximus, book V, ch. 1.

6. Whether one who comes late to the ground on the day appointed for a duel is to be adjudged to have lost his cause?

When Charles of Anjou, Count of Provence, and Peter of Aragon were disputing about the kingdom of Naples, it was arranged with the consent of Pope Martin the Fifth that (each accompanied by a hundred horsemen) they should engage in combat on a certain day in the city of Bordeaux, which was then under the King of England. On the appointed day Charles presented himself with his soldiers early in the morning, and waited for the enemy until the fifth hour after noon, when, as he did not appear, Charles rode off together with the umpire, accusing Peter of being a defaulter. Immediately after his departure, Peter came up, and not finding Charles protested that he had run away and that he himself had kept the appointment. On these facts doubt arose as to who had the better cause. On behalf of Charles, it was argued that he had been present at the proper time and had waited for his enemy through far the greater part of the day; on behalf of Peter it was urged that he had come at a convenient time for fighting the battle to an issue, and that his adversary had not waited until sunset with the umpire, as he ought to have done. To settle the dispute another day was appointed by the Roman Pope for the combat, and when Peter refused to come it was adjudged that he had made default, and on that ground he was deprived of the kingdom.

Alciati, on Single Combat, ch. 41; Belli, II, § 5.

7. Whether enemies may be pursued in the territory of a friend?

When war was raging between the Romans and Carthaginians, and both were at peace with Syphax, King of Numidia, Scipio arrived with two galleys at a port in the dominions of Syphax, in which were seven galleys of the Carthaginians. Scipio's ships might have been overwhelmed by the Carthaginians before they entered the harbor, but they were carried into harbor by a brisk wind before the Carthaginians could weigh anchor, and Livy says that the Carthaginians did not then dare to attack them in the King's harbor. But according to the Law of Nations an enemy may be attacked wherever he is; thus Euripides says the laws allow an enemy to be injured wheresoever he be found; and the jurist Marcianus says that deserters may be killed wherever they are found, just as if they were enemies. That enemies may not be killed or injured in the territory of others, is not a personal right of their own, but a right of the ruler of the territory; for civil societies have been able to determine that no violence should be done to persons within a territory, except after an appeal to law.

Gentilis, II, 12; Spanish Advocation, II, 5; Grotius, III, 4, § 8; Belli, II, § 12; Bodin, I, 6, § 68.

8. Whether a man taken a prisoner on hostile soil may be conducted through the territory of a friend?

When the Genoese and Milanese were at war, an officer of a Milanese regiment conducted a Genoese nobleman, whom he had taken prisoner in battle within Genoese territory, through the district of Bologna, which is the territory of the Pope, to a Milanese castle. And it appeared that he was entitled to do so because, the prisoner having been lawfully captured in the first instance, the officer might exercise his right over his captive. But the Papal Legate, thinking this action prejudicial to his master, consulted the celebrated jurist, John of Imola, who gave it as his opinion that it was certainly not lawful to lead a prisoner through Bolognese territory without leave being obtained; and further that any one who had done so was liable to an action for wrong, and was bound to deliver up his prisoner to the Legate, if asked. This view was approved by Pierino Belli on the ground that a prisoner taken elsewhere, but not yet conducted within guards, ought not to be detained or subjected to restraint in the territory of another.

John of Imola, Opinions, 50; Belli, II, § 12.

9. Whether foreigners found on hostile soil may be molested?

When the Corcyræans were about to lay siege to Epidamnus, they first gave foreigners an opportunity of departing, announcing that otherwise they would be treated as enemies. The formula in Livy is this, " Let him be an enemy, and they that are within his guards." The reason is that injury may be feared from such persons. This is the rule in regular war, but not in reprisals to which foreigners are not subject, unless they share in public burdens and services; and it only applies to those foreigners who came before the war and, on its breaking out and being known, remain within the territories of the enemy, not to those who are conveyed thither after war has begun but before it is known.

Grotius, III, 4, § 6.

10. Whether victory is to be determined by remaining on the field of battle?

When the Argives and Spartans were contending for the territory of Thyrea, the Amphictyons decided that the matter should be settled by a fight between picked men from each side. The Spartans on their side put in command Othryadas, the Argives Thersander. After the battle, two of the Argives survived, Alcanor and Chromius, who brought back news of victory to their countrymen; and after they had gone Othryadas, who had been wounded, collected the shields of the dead Argives and erected a trophy, which he consecrated to Jupiter with his own blood. The quarrel was renewed on the question of the victory, and the Amphictyons were again constituted the judges. At the trial the

Argives contended that the victory was theirs in virtue of their having the larger number of survivors; the Spartans claimed it because, when the others of the opposite side had betaken themselves home, the single surviving Spartan remained on the field of battle and collected the spoils; and judgment was given for the Spartans.

Gentilis and Grotius, however, are of opinion that although those who keep the field of battle are presumed to be the victors, yet if it was not shown that the Argives had withdrawn from fear, they should certainly not have been regarded as beaten, especially as they went away at nightfall, thinking themselves victors and intending to carry the news to their countrymen.

Plutarch, Lives, Gentilis, III, 15; Grotius, III, 20, § 45.

11. Whether victory is to be determined according to the rank of those who are slain or captured, or according to their number?

Philip, King of Macedon, and Attalus, King of Pergamus, met in a naval battle, in which it befell that one of Philip's ships took the royal ship of Attalus, which had been abandoned by its crew, and brought it into anchorage not far from the scene of battle, whereupon Philip claimed the victory as his own. But, as Polybius says, he rather acted as victor than felt himself to be such, because he had lost many thousands of his own men and incomparably more ships, whereas on the side of Attalus very few ships were lost and not more than a hundred men perished. This opinion of Polybius both Gentilis and Grotius approve.

Polybius, book XVI; Gentilis, III, 15; Grotius, III, 20, § 45.

12. Whether those who yield to new forces coming up are to be regarded as defeated?

After a naval battle which, according to Thucydides, was the greatest ever fought by Greeks with Greeks, victory was claimed by both sides. The Corinthians set up trophies because they had had the better of the Corcyræans in the battle until nightfall, had sunk about seventy ships, taken not less than a thousand prisoners, and recovered more wrecks and bodies; and the Corcyræans also set up a trophy because they had destroyed about thirty ships of the Corinthians, and the others retreated when the Athenians came up and declined a fight, thus giving the Corcyræans an opportunity of collecting their wrecks and bodies. And so, he says, both sides argued that they were victorious; but the Corcyræans, according to Grotius' opinion, had no ground for doing so, since the Corinthians had had the better of the battle with them and yielded not to the Corcyræans, but to the Athenians.

Thucydides, book I; Grotius, III, 20, § 45.

13. Whether a prize appointed to the one of two combatants who slays the other is due to one who puts the other to flight?

When Paris and Menelaus were about to fight for the possession of Helen, they made a bargain in which one of them proposed that Helen and all her goods should be given up to the one who should overcome the other, and the other agreed that the one who should slay the other should win Helen and her goods. The combat began and Paris betook himself to headlong flight. In Plutarch's Symposiaca, the question is discussed whether Menelaus was entitled to Helen. And some thought he was, because the condition first offered was "if the one should overcome the other," which Menelaus, who had put Paris to flight, undoubtedly did; and although the subsequent reply was, "if the one should slay the other," it was inoperative, because a condition offered by one could not be changed by the other.

Others were of opinion that the words of the latter condition were declaratory of the former, because it might have been uncertain when one overcame the other, but there could be no uncertainty if the other was slain. Consequently, that condition not having been fulfilled, Menelaus was not entitled to Helen. And Plutarch says the matter was so concluded, because, as judges, when one part of a law is repugnant to another, adopt so much of it as admits of no dispute, and reject what is obscure, so here an agreement is rather to be understood which expresses an easily ascertainable issue of the combat and admits of no objection being raised.

Gentilis, however, says that Paris ought to have failed in his case and lost Helen, because it was his flight that made it impossible for any other issue to be put to the combat; for the interpreters of the law tell us that if one promises another to give him something if he beats him in a race, and then refuses to run himself, he is none the less bound to give the thing.

Plutarch, Symposiaca; Gentilis, III, 15.

14. Whether if a reward is offered to him who first scales the walls of a city, and two scale them at the same time, a reward is due to each?

When New Carthage in Spain was taken, and Publius Scipio wished to reward the valor of the soldiers who had scaled the walls, he publicly proclaimed that the preëminent honor of a mural crown should belong to him who had first scaled the walls. Two men claimed to have done so, nor could it be determined which of them was first, because they had made their ascent together. Livy records that Scipio presented both with mural crowns on account of their valor.

The jurist Ulpian, however, says that if a legacy is left to the man who shall first climb the Capitol, and two are said to have arrived at the same time, and it does not appear which arrived first, neither of them

can claim the legacy; and Hugo Donellus, in his commentary on this discussion of Ulpian, says that Scipio acted as he did more by way of grace than of legal obligation, and that Scipio knew this well enough when he privately declared that he had not given the prize to both because he was bound to do so, but because he judged it expedient to ignore the point under the circumstances; in short, as Livy says, he did it to check a mutiny to which the enthusiasm of factions among the troops seemed likely to lead, if he had preferred one to the other or given the prize to neither. Grotius records that Chrysippus once discussed this question, whether a prize offered to him who first reaches the goal is due to both or neither, if two men reach it at the same time. The word "first" is ambiguous, for it means either the man who precedes all, or the man whom no one precedes. But because prizes are matters of favorable interpretation, the better opinion is that they should share the prize; although not only Scipio, but both Cæsar and Julian more generously awarded full prizes to men who scaled walls together.

Livy, book XXVI; Digest, XXXIV, 5, 10; Donellus, on this passage; Grotius, II, 16, § 19.

15. Whether a herald passing through to foreign countries is bound to obtain leave?

Ferdinand Gonzaga ordered a herald of Francis the First, King of France, who had been sent into Germany, to be put in custody, and by an edict of the Imperial Council this same person was bidden to quit the borders of Germany, and a proclamation was made forbidding any other person of the same condition thereafter to set foot within the confines of the Empire, without first obtaining leave. As to this incident Paschal says:

"Where, I ask, has any man read or heard that a herald must obtain leave or a safe-conduct? His very office is himself to obtain these favors for others, and he has the peculiar right of penetrating where it is either unlawful or unsafe for ambassadors to go. So the King of the Argives seems to have thought in Æschylus, when he expresses surprise that the Danaids had dared to set foot in his realm, without first sending a herald."

Paschal, chs. 3 and 22.

6. Whether there is a right of embassy with those who are not regular enemies?

The Emperor Theodosius threw into prison the ambassador of a certain tyrant who had rebelled against himself; and Cicero censured the admission of an ambassador from Antony, to whom the gates of the city ought not to have been open, and proposed that he should not be allowed to return to Antony. Alexander, however, as Curtius relates,

when he besieged twenty thousand robbers, and the barbarians sent ambassadors to him, ordered them to be admitted at once; and Cæsar, in the third book of the Civil War, expressly says that deserters and brigands in the valleys of the Pyrenees were allowed to send ambassadors. But the general opinion is that the right of embassy belongs only to regular enemies, and that ambassadors from others are sometimes admitted, not out of regard for them, but for the sake of the general advantage, since otherwise all means of reconciliation would be cut off; and if word has been pledged to such ambassadors, it is quite clear that it may not be broken.

Ayrault, Judgments, on Embassies, ch. 23; Gentilis, on Embassies, II, 3; Grotius, II, 18, § 2.

[*Whether the ambassadors of enemies should be admitted into camps and besieged places?*]*

The ambassadors of the Bœotians, who were enemies of the Romans, were not admitted into the camp by Titus Quintius; and Constantius excluded from the camp the ambassadors of Magnentius. And the same rule is observed in besieged places; thus the Goths, who were holding Urbino with a garrison, bade the ambassadors of Belisarius begone from the place with all speed. This rule is eminently reasonable; since men who are in a camp or a besieged place have less confidence in their own strength.

Those, however, who do not doubt that they are far stronger than the enemy, have less dread of admitting the enemy's ambassadors even into a camp. Thus Alexander led twenty ambassadors of the Scythians on horseback through his camp, admitted them to his tent, and bade them be seated; and the Roman consuls at Utica similarly admitted an embassy of the Carthaginians. Each consul sat on a raised throne, the generals, tribunes, and columns of legionaries standing by on either side, everywhere gleaming eagles and standards fixed, in order to impress the ambassadors with the formidable number of the troops; then at a word from the consuls the trumpet proclaimed silence and a herald cried, "Approach the Carthaginian Ambassadors"; and they, passing through ranks of armed men to the place of the Tribunal, were bidden by the consul to declare what they had come to seek.

So, too, in the year 1576 Rosenberg, a Bohemian knight, ambassador from the Emperor Maximilian to the Poles, was admitted and led through the midst of the camp and between serried troops of horsemen to the spot where the Senate sat in full assembly; whence he learned how ridiculously false was the story, of which certain persons had convinced the Emperor, that Stephen Bathory had been elected king by a faction in the kingdom which might easily be despised.

* This *quaestio* is to be omitted. See Vol. I, Errata. The topic is treated supra, p. 49.

17. Whether an ambassador passing through on his way to an enemy may be intercepted?

When Fregoso and Rincon, ambassadors of Francis, King of France, who were secretly traveling through Italy to the Turk, were captured and put to death, the King of France complained of a grave injury committed against the Law of Nations. But Thucydides relates that ambassadors of the King of Persia to the Spartans were intercepted by the Athenians; and the Romans intercepted ambassadors of the Carthaginians on their way to the King of Macedonia. This is undoubtedly lawful if there is a reasonable suspicion that they are plotting against those through whose territory they pass; but if it is clear that they have been sent on other and distinct business, it is less lawful to hinder them. And so Alexander the Great, after the capture of Tyre, sent away the ambassadors of the Spartans unhurt, as Curtius relates, because they were there to celebrate an annual religious festival.

Bodin, V, last chapter; Besold, on Embassies, ch. 5, § 15.

18. Whether a safe-conduct granted to one making a journey extends to one making ready for a journey?

Juan de Figueroa, general of the army of Philip, King of Spain, granted a safe-conduct to the Marquis of Messara (who was of the French party) to go from his own castle to Venice. Afterwards the same general invaded the lands of the said Marquis, took him prisoner, and demanded the price of ransom from him. His excuse was that the safe-conduct had been given for him to make a journey in safety, not for him to stay at home in safety; and he had been taken in a place where he might have assisted the enemy by his counsel and influence. For the Marquis it was urged that he was making ready for the journey when he was taken, and ought to be regarded as actually making it, because no one could have suspected that for one to whom a greater thing had been granted, namely to pass through the territory of the King of Spain, a less thing, namely to remain at his own home while making ready for the journey, would be fraught with danger. Pierino Belli says that, as one of the judges, he left the dispute undecided, and he leaves the decision to the reader.

Belli, IX, § 15.

19. Whether when a safe-conduct is given for going, it should be held to be granted for returning also?

Bartolus, Angelus, and other doctors say that a safe-conduct given for going is deemed to be also given for returning, because a man is not said to have come to a place in security, who is not allowed to withdraw in safety; and because the time of coming, remaining, and returning is regarded as the same. Alexander, however, Geminian, and others hold the contrary, because the Emperors Constantine and Julian decreed

in express words that ship-masters should enjoy security "coming and going." Pierino Belli thinks that the answer may depend on circumstances, and on the intention of the grantor of the safe-conduct. For if the general of a war were to grant an enemy a safe-conduct to come within his guards and to stay there three days, it would be absurd if, after the lapse of three days, he were not to allow him to depart in safety. But if he were to grant him safe-conduct to go to Rome, or to go into France, the act is exhausted by the mere going, and the words should not be departed from.

Belli, IX, § 21, and authorities by him cited.

20. Whether a safe-conduct for going is to be restricted to the first act of going alone?

The jurists are agreed that a safe-conduct is restricted to the first act and that a repetition is not permitted, with the proviso, however, that if the request was simple and indeterminate, and the grant was determinate and named one or more times, the safe-conduct must be understood according to the determinate grant; and if the request was determinate, and the safe-conduct granted simply and indeterminately, the terms of the request must prevail. If, however, the request was simple and indeterminate, and the safe-conduct similarly granted in simple and indeterminate form, it must be understood to mean once only, and that the first time. Unless, indeed, the reason of the request requires a different construction; as if it was requested and granted for the purpose of treating of peace; for in that case the safe-conduct should be allowed an indefinite number of times, as long as the negotiations for peace continue.

Bartolus on Digest, XLVIII, 4, 1; Belli, IX, § 24, and authorities by him cited.

Whether one to whom a safe-conduct for going has been given may send another in his place?

When a safe-conduct was given to a certain Marcellus to come to the city of Asti with ten horses and other things, he sent his wife in his own stead, and on this account the horses and other things were intercepted. Baldus maintains that he had a right to send his wife, because of the unity existing between spouses, and that the horses and other things ought to have been restored, because they were included expressly in the letters of safe-conduct. Grotius, however, holds the following opinion on this and the preceding questions: One who is allowed to depart is not necessarily allowed to return; and one who has leave to come himself, can not send another; for these are different things, and reason does not compel us to wander from the words. Moreover, one who is allowed to come may come once, and not more than once, unless some addition to the words makes another meaning probable.

Belli, IX, § 13; and authorities there cited; Grotius, III, 20, § 16; Gentilis, II, 14.

21. Whether a safe-conduct given during peace may be violated on war breaking out?

When by reason of a truce there was peace between the Emperor and the King of the French, a certain German named Savorgnan, a soldier of the King of France and a man of gentle birth, obtained from Francis d'Este, the representative of Ferdinand Gonzaga, the Imperial general, a safe-conduct to betake himself to Acqui in Liguria, to recover his health. He had hardly arrived there when the French attacked two garrisons of the Imperialists and the war suddenly burst into flame. Thereupon the German, distrusting his safe-conduct, started to return home and was detained at Asti by Francis d'Este, the commander of the garrison. The reasons alleged were that the grant of a safe-conduct was to be understood to hold good while things remained in the state they then were, whereas now things had been altogether changed by the conduct and fault of the troops of the King of France. The interests of the Emperor also required his detention because he had surveyed the garrison at Asti and observed the weak points in its fortifications. Pierino Belli, however, advised the generals, Ferdinand and Francis, that it was not right to obscure the Emperor's promise by quibbles, nor to destroy its meaning by arguments; that brought no honor to one who had both given the promise and had power either to detain or release the prisoner; by which means he procured the release of the German, but not until some time afterwards, on account of the weakness of the camp and garrison of Asti.

Belli, IX, § 30.

22. Whether one who is released on condition of returning if another is not given up in his place is bound if the other dies in the interval?

Guicciardini and Giovio relate that a certain Baglione, who had been taken prisoner, was released on the condition that he would return, if another, whom we may call Titius, were not given up in his place. Baglione conducted Titius towards the enemy as far as he could venture without a herald, and there, while he was waiting for a herald from the general who had released him, and to whom Titius was to be given up, a subordinate general decided that the exchange was void; and in the meantime Titius died. In this case Gentilis says that there is nothing to be said against Baglione, since it is a rule that whenever one who is interested in the fulfilment of a condition does nothing to prevent its fulfilment the case is as though it had been fulfilled. Grotius, however, holds that an act of a third party gratuitously promised is sufficiently fulfilled if nothing is omitted on the part of the promisor; but that in onerous promises one is bound to give an equivalent. Hence in the question raised, the person released is not bound to give himself up into

custody, for the presumption in favor of liberty does not allow us to give that meaning to the agreement; but he ought to render the value of that thing which itself he can not render.

Gentilis, II, 15; Grotius, III, 21, § 30.

23. Whether the period of a truce is to be reckoned from the moment or from the day?

A truce of five years was made between Philip, King of the Spains, and Henry, King of the French, on the further side of the mountains, on the fifth day of February, in the year 1555, providing that from that day the war should be suspended. On the same day the Sieur de Brisac, general of the French army on the nearer side of the mountains, stormed a Spanish fortress called Vignale; and the question was raised whether the fortress might be retained by the French, as having been captured during the existence of the war; or whether it ought to be restored, on the ground that it was captured while the war was suspended by the truce? The reason for thinking that it might be retained was that the war was suspended " from that day," that is, " after the conclusion of the day." On the other hand, the reason for thinking that it ought to be restored was that the words " from that day " may bear the meaning (as the jurists maintain) of " from the commencement of that day," so that the whole day would be included; and where there is a presumption in its favor (as there is in favor of the effects of a truce, namely, the cessation of hostilities and the retention of possession) this wider interpretation should be admitted.

Pierino Belli held that time should be reckoned from the moment, because it is as unfair that hostilities should continue when a truce has been completed as it is absurd that the ordinary operations of war should be forbidden before a truce is concluded. Grotius lays down the following rule as to the time at which a truce terminates. The duration of a truce is usually prescribed either as a continuous period, as " for a hundred days," or with a fixed terminal point, as " till the first of March." In the former case the reckoning should be made to minutes; for that is the natural way, whereas the reckoning made according to civil days is derived from the laws or customs of peoples. In the second case there is usually a doubt whether the day or month to which the truce is to last is meant to be included or not; and it appears that it should be included; as if one were to say that something should be done " within the day of his death," the actual day on which he dies is reckoned in. Thus Spurina had predicted for Cæsar a danger which should not extend beyond the Ides of March, and when he was reminded on the actual Ides, he said that the Ides had come, but not gone; and this interpretation, he says, should even more certainly be adopted when the extension of the time is in itself favored, as in a truce which means the saving of human life.

Belli, V, § 16; Grotius, III, 21, § 4; Gentilis, II, 12

24. Whether one who by reason of necessity is found on hostile soil after the time prescribed for a truce is subject to the evils of war?

An agreement of truce contained a provision that any enemy who was with us should leave the harbor before the 15th of March. One of them was prevented from sailing by ill health or a storm, or was carried back into harbor by the wind; later, when the 15th of March was past, he wished to leave. The question is whether he can claim the benefit of the truce. Bartolus gave it as his opinion that the terms being as stated, an enemy found within the harbor might be put to death with impunity, and no regard need be paid to the manner of his detention beyond the stated time.

Besold rejects so inhuman an opinion as repugnant to natural equity and opposed to the tenor of the law, and argues that the protection of the truce should be extended to him and that an unforeseen misfortune should not prejudice him. He adds this provisō, however, that he must not have put himself into a position where the happening of the misfortune was inevitable.

Grotius, however, agrees with Bartolus and says that the case here put raises strictly no question of a penalty, but of a right which lapsed at a definite time; hence the man seems to be in the same position as one who, having come in time of peace, and war suddenly breaking out, is unlucky enough to be apprehended among the enemy. However, he adds, there is no doubt that it is more humane and generous to release such a man.

Bartolus, on Digest, XXXIX, 4, 15; Besold, on the Law of Peace, ch. 6, § 5, Gentilis, II, 13; Grotius, III, 21, § 9

25. Whether the violation of a truce may be punished within the period of the truce?

When the Carthaginians during a time of truce attacked a Roman fleet which had been scattered in a gale, and during the same truce fortune delivered some ambassadors of the Carthaginians into the hands of Africanus the Elder, he, after declaring that they had violated not only the truce but the Law of Nations as well, said that he would nevertheless do nothing unworthy of the traditions of the Roman people or of his own character. And indeed some jurists say that the violation of a truce on one side does not justify its violation by the other side, but that it is sufficient that punishment may justly be inflicted when the truce has expired.

Others, however, lay down a different rule especially in truces of long duration and in places which on account of their neighborhood are convenient for offensive operations, on the principle that one who breaks treaties and oaths should not be in a better position than one who honorably observes them. They attribute the conduct of Africanus to generosity rather than to justice.

Belli, V, § 1; and authorities by him cited.

26. Whether women taken prisoners should be ransomed?

When the Spaniards asked that women who had been taken prisoners by the Italians should be restored to them without ransom, the Italians refused. The Spaniards' request was supported by considerations of humanity and by the ancient custom of treating the weaker sex as exempt from all hardship; and the Italians' refusal by a recent Roman disaster, in which they ransomed girls and even infants from the Spaniards by a fine of gold.

Gentilis says that right was on the side of the Italians, who were justified in returning the example of injustice set them by the Spaniards. The King of the French, however, provided a noble solution, which at once confirmed the justice of the Italians' action and maintained what we call the right of women; for the King gave the money to the Italians and generously restored the women to the Spaniards.

Gentilis, II, 2 and 21.

27. Whether those taken prisoners in a pitched battle should be ransomed at a higher price than those taken on other occasions in war?

In the Neapolitan war between Ferdinand, King of Spain, and Louis the Twelfth, King of France, Mariana relates that the French prisoners taken at Ruvo were the subject of a dispute carried on with much warmth on both sides. It had been agreed between the armies that a captured horseman should, after being deprived of his horse and arms, be allowed to buy his liberty by the payment of a quarter of his annual pay. The French had a few days before captured Theodoro Bocalo (a general of Albanian cavalry), Diego Vera (who was in command of the artillery), and Escalada (captain of a company of Spanish infantry), and about thirty others. They released the others on the terms and price agreed, but detained these three on the plea that they were officers and as such ought not to be included in the general rule, and that those of higher rank ought to be excepted from conditions applying to the ordinary man. Now, however, as if forgetting their own action, they demanded that the French taken at Ruvo should be released at the agreed price, without regard to the fact that many of them were officers of high rank and in command of troops. Further, Gonsalvo, the Spanish general, was informed that the rule of the Neapolitan war, that a horseman should be ransomed for a quarter of his year's pay, did not extend to prisoners taken in a pitched battle or at the capture of a town. The veterans and the elder nobles of the province were consulted and replied that this was the rule observed by the custom of the province. But whether this opinion was given to please, says the author, must not be inquired too closely. At any rate in accordance with this opinion a reply was given to the French that the prisoners must bargain about the price of liberty with those in whose hands they were, and must not claim the benefit of

the common privilege of the others. The motive of this decision, he thinks, was not the profit of a few persons, but by this pretext to prevent good soldiers from taking part in a battle which, as matters then stood, seemed likely to take place shortly with decisive result.

Mariana, History of Spanish Affairs, book 27, ch. 18.

28. Whether a private soldier is bound to fulfil a promise made to an enemy on account of his ransom?

The Lusitanians having taken three prisoners released one of them on condition that he should bring money for the three and that, if he failed to return, the other two should pay for him as well. The man refused to return and accordingly the other two paid the money for all three. The jurist Servius advised that it was equitable that the prætor should grant an action against him; because, says Gentilis, he was under an obligation to return, for, if he were not under an obligation, the *negotiorum gestio* or unauthorized agency would have been of no service to him. There is, however, a great conflict of authorities on the question whether a private soldier who is released on a promise to pay a ransom or else to return to the enemy is bound to keep this agreement.

For Bartolus, Baldus, Angelus, and others say that the agreement need not be kept; and their opinion is supported vigorously and at some length by Zazius in his controversy with Eckius. The contrary opinion is held by Decius, Alciati, Duaren, Covarruvias, Garsias, Hotman, and Bodin, the last of whom says that the dictum of Bartolus is too trivial to be worth confuting; and custom, too, supports this contrary view, as Fulgosius testifies. Regulus is held to deserve the highest praise for keeping his word in such a case; and the Romans sent back to Hannibal a soldier who attempted to break his word so given.

Covarruvias and Garsias, however, allow that a promise which contravenes public or military law, should not be kept; among which promises Gentilis places a promise not to serve one's prince or country. For although a man keeps a promise to return to the enemy, and thereby deprives his prince or country of his services, yet this promise is good, his capture having already deprived them of his services. For we may concede even against public interest that a thing should not exist; but that it should exist without performing its proper function can not be conceded, for that is against nature.

Grotius agrees with Gentilis against Bartolus, and wonders that there should have been found masters of law to teach that public agreements made with enemies bind honor, whilst those made by private persons do not. For since private persons have private rights which they can bind, and enemies are capable of acquiring rights, what can there be to prevent an obligation arising? But how far the power of private persons to make agreements extends is, he says, a more difficult question;

and as regards an agreement not to serve against one in whose power a man is, although others pronounce such an agreement void on the ground that it is contrary to the duty which a man owes his country, he came to a different conclusion. For everything that is contrary to duty is not necessarily void, and moreover it is not indeed contrary to duty to win your liberty by promising something which is already in the enemy's power. For the cause of the country, he says, is in no way injured, since one who has been taken prisoner, unless liberated, should be regarded as already lost to it.

Digest, III, 5, 21, pr.; Gentilis, II, 11; Hotman, Famous Questions, 7; Grotius, III, 22, §§ 1, 5, 8.

29. Whether terms of surrender granted by a general must be adhered to by the supreme authority?

When Maharbal had pledged his word to certain Romans who had escaped from the battle of Lake Trasimene, not only to preserve their lives, but, if they would hand over their arms, to allow them to depart each with a single garment, Hannibal, who was some distance away at the time, afterwards detained them on the pretext that it was not in Maharbal's power, without consulting him, to pledge his word to persons who surrendered that he would keep them whole or uninjured. On which Livy expresses his verdict by saying that Hannibal acted in this with Carthaginian faith and piety. But when Sophonisba, who had been taken prisoner in war, had received her freedom from the general Masinissa, Scipio held that the Roman Senate and People could alone decide such a matter, and therefore that Masinissa, who was general when Sophonisba was captured, had no power to give her her freedom.

Grotius makes this distinction: Persons or lands actually captured in war, it is not within the competence of generals to give up; but of things not yet captured it is undoubtedly within their competence to dispose, because towns and men often surrender on condition of their lives being spared, or of retaining their liberty and property, matters on which circumstances do not, as a rule, allow the decision of the supreme authority to be asked.

Grotius, III, 22, § 9, and notes to that passage; Camden, Elizabeth, 1594

30. Whether those who surrender too late should be accepted?

When the Ionians heard that the Lydians had been conquered by the Persians, they sent ambassadors to Cyrus begging him to receive them on the same terms as those on which he had accepted the surrender of the subjects of Crœsus. Cyrus, however, returned them the following answer: A certain piper, having espied some fish in the sea, began to pipe to them, thinking the sweetness of the music would attract them to

land; but being disappointed of his hope, he cast a net into the sea, and inclosed a great draught of fishes and drew them to land. And when he saw them jumping about, he said, " Cease your dancing now, I beg, since you would not come out and dance when I piped."

Cyrus gave this answer, says Herodotus, because the Ionians formerly, when he urged them by ambassadors to revolt from Crœsus, obstinately refused, and then, when events did not turn out as they expected, they were ready to submit to him. In the same spirit the Duke of Alva censured Prospero Colonna for having accepted the surrender of a fortress in which a breach had already been made by artillery, because he thought its defenders did not deserve to have their lives or property spared. But Scipio, when the scaling-ladders had been already set against the walls of a Spanish city, granted the petition of the townsfolk, by the mouth of a herald, to be allowed to depart in peace, and ordered the retreat to be sounded; and when it was not heard or obeyed and the town was stormed, he repaired the deed and even punished his own men. And Cicero says that those who lay down their arms and throw themselves on a general's honor should be received, even though the ram has already pierced the wall.

Herodotus, book I; Gentilis, II, 17.

31. Whether one who has agreed to allow liberty to soldiers may detain the general?

Natalis Comes tells of a general who agreed that a garrison might depart, and then detained the commander; an absurd quibble, says Gentilis, because, as the father of a family is included in the word " family," so the commander is included in the garrison, and under the word " garrison."

Gentilis, II, 14; Grotius, III, 21, § 5.

32. Whether one who has agreed to allow an army to depart may detain his own subjects who are serving therein?

After agreeing that the French army might depart from the Kingdom of Naples, the Spaniards said that the agreement must not be understood to apply to Neapolitans who were in the French army; and, according to Gentilis, they were justified; because, although they could not have come to a more harsh decision, the title to that kingdom being a subject of the keenest controversy, still they were entitled to detain those whom they considered their own subjects; and the French ought to have made express mention of the Neapolitans in the agreement, because mere adherents are not included in an agreement unless they are expressly referred to.

Guicciardini, book VI; Gentilis, II, 18.

33. Whether the lives of those who surrender to the honor and mercy of a victor should be spared?

The city of the Falisci, which had several times rebelled and had always been defeated in battle, was at last compelled to surrender to the consul Quintus Luctatius. The Roman people desired to wreak their vengeance on it, but being informed by Papirius, whose hand, by the order of the consul, had written the terms of surrender, that the Falisci had committed themselves not to the " power " but to the " honor " of the Romans, they calmly laid aside all anger, and resisted the promptings of a hatred not wont to be easily overcome, in order, as Valerius Maximus says, not to fail in justice.

And again, as Diodorus Siculus records, when the Syracusans debated, after the defeat of the Athenian army, what should be done with the prisoners, and the others all to a man advised that they should be put to death, a certain old man named Nicolaus, arguing in favor of showing mercy towards them, said: " They have surrendered with their arms, trusting to the mercy of the victor; wherefore it were shame that their hope of our humanity should be disappointed." And later: " What Greek ever thought that those who have committed themselves to a victor's mercy should receive a punishment from which there is no appeal? " Nevertheless, when Phaneas, the ambassador of the Ætolians (who had surrendered themselves and their possessions to the honor of the Roman People), answered the demand of Manius the Roman consul that certain instigators of the war should be surrendered to him without delay, by saying that they had given themselves up not to the slavery but to the honor of the Romans, and that the consul's demand was contrary to the custom of the Greeks, the consul flung back that he cared nothing for the Greek custom and that by Roman custom he had full authority to treat those who surrendered at his own discretion, and he ordered the ambassadors to be put in chains.

The view that the lives of those who surrender should be spared is supported by the ruling of the jurist Baldus, who says that if to-day a state should surrender itself to another after the manner of an ancient surrender for the victor to do with it as he would, yet he ought not to take life; and others maintain that if one commits himself to the " good grace " of another, his person may not be injured; for by his so committing himself, it is deemed to be impliedly agreed that grace shall be shown; and it is the same thing if one submits himself to the " will " of another.

Referring to these questions, Pierino Belli says that they are of the first importance in warfare, because of those persons who, when they are unable to defend any longer a garrison intrusted to them, surrender at discretion, when sometimes some are crucified and others sent to the galleys; which, he says, ought not to be; for " discretion " imports the

judgment of a good man. Gentilis, who discusses at length the interpretation of such words in the usual forms of surrender, in every case concludes that they ought at least to extend to the mere protection of life. He adds the warning, however, that he is not speaking of subjects, for these, even though they surrender at discretion, seem to make a far more complete submission.

Grotius infers from the words of the consul Manius (although he released the Ætolian ambassadors) how freely and without violating the Law of Nations one to whose honor a people have intrusted themselves may act; and he maintains that these words imply nothing more than mere surrender and that the word " honor " in such a context means no more than the mere integrity of the victor to whom the vanquished commits himself. He goes on to say that in his judgment it makes no difference whether in surrendering a man says that he surrenders himself to the other's " wisdom," or " moderation," or " mercy "; for all these words are merely compliments. In support of this opinion he quotes Polybius as saying that the Romans count it the same thing for a man to commit himself to the honor of another, and for him to give the victor absolute power to decide his fate. But with regard to the duty of him to whom the surrender is made, he cites the words of Seneca: " Mercy has absolute discretion; it judges not under a legal formula, but on principles of equity and fairness; and it may acquit the accused or assess the damages at will."

Valerius Maximus, VI, ch. 5; Belli, II, § 5 at the end; Gentilis, II, 17; Grotius, III, 20, § 50 and notes to that passage.

34. Whether those who surrender after bargaining for their lives or safety may be made slaves or detained as prisoners?

The Emperor Charles the Fifth threw into prison a Landgrave who had come to him after receiving a promise of safety; and Giovio relates that the Turk, without breaking his word, made slaves of men who had bargained for their safety. These actions appear not to have been justified, because those who are not at liberty to return home are very much in the position of slaves, and slavery is in law death, or the equivalent of death.

Gentilis says that one who has only bargained for his life may be made a slave, for it is a subtlety of the Civil Law which makes slavery equivalent to death; and much more may he be treated as a prisoner who is not a slave; and this is what Giovio says that Gonzaga did. But he does not approve of the conduct of the Turk in making slaves of those who had bargained for safety, because he holds that this word implies something more than the word " life "; and further he says that the action of Charles the Fifth in imprisoning one to whom a promise of safety had been given is also to be censured.

Gentilis, II, 17; Giovio, book 37.

35. Whether women who were allowed to carry with them whatever they could might carry out their husbands?

When Roger, King of Sicily, and the Roman Pope had persuaded Guelph of Bavaria to stir up war against the Emperor Conrad the Third, Henry, the Emperor's son, engaged him in battle. This Henry was born in the town of Waiblingen, the name of which he enjoyed as a family name, in memory of his birth, and in his army " Ghibelline " was the battle-cry, while on the other side it was " Guelph." In this war the victorious Emperor, after the capture of a certain town, determined to deal severely with the men, but gave leave to the women to depart, granting each of them the right to so much of her own things as she could carry out on her shoulders. But burning love gave cunning to their wits and strength to their weakness; and they carried out their husbands. Instead of being incensed at being tricked and outwitted by this splendid deceit, the Emperor, victorious as he was, allowed the vanquished general to lay down his arms and received him into favor. The names, however, remained, and the practice of calling the Papal party " Guelphs," and the Imperial party " Ghibellines " continued from that time onwards. Paulus Æmilius gives this account of the women's deed. Gentilis says it was a " pious fraud "; for things which are animals are said to be " led " or " brought," not " carried," a word which should not be given a ridiculous or artificial meaning.

Paulus Aemilius, book VII; Gentilis, II, 17

36. Whether those who have bargained to leave with clothes may leave with arms?

The Coroneans made war on the Chians who had wrested Leuconia from them; and when the Chians were utterly unable to resist their strength they surrendered on these conditions, that they should be permitted to leave the city each with a cloak and a single garment. On hearing these terms, the Chian women bitterly reproached their husbands for having resolved to leave their arms and intrust themselves naked to an armed enemy; and when they replied that they were bound by their oath and had no further choice in the matter, the women insisted that the arms must on no account be left behind, especially as they could quite well satisfy the pledge they had given by telling the enemy that a brave man's spear was his shirt, and a shield his cloak. The men agreed to take this counsel, and on the day appointed for the departure suddenly marched forth into the midst of the enemy fully armed. Terrified at their audacity and seeing them well equipped and ready for anything, the enemy did not dare to obstruct their march, nor to advance against them, thinking themselves well out of the affair if the foe would depart leaving everything else.

Hegesippus quotes the saying of a Roman soldier, "Arms are a burden to others, to us they are a covering"; and when the gates were betrayed to the Sabines by the maid Tarpeia, daughter of the commandant of the Capitol, who had asked as the price of her treachery for what they wore on their left hands, which might be either shields or bracelets, the Sabines, in order to keep their word and at the same time to punish her, crushed her beneath their shields.

Gentilis, however, shows that in law clothes mean one thing and arms another; that in agreements of this kind arms are usually distinguished from clothes, and that the practice of ordinary speech and common sense should be observed.

Plutarch, Famous Women, Gentilis, II, 17

37. Whether a license granted to persons extends to their goods?

A safe-conduct was given to a Castilian who gave up a fortress to depart in safety with his allies and with his goods. The question was raised whether the allies too might take their goods. Florian, who was consulted by the Duke of Carmagnola, gave it as his opinion that the safe-conduct did not extend to the goods of the allies because of the possessive pronoun "his," which imports ownership. This opinion is not approved by Gentilis, who asks whether the allies must go naked, and why, if the license given to the Castilian covered the Castilian's goods, that given to the allies should not also cover the allies' goods. And therefore it appears to him that the words "with his goods" must be taken in the sense of "each with his goods."

Belli, IX, § 24; Gentilis, II, 14.

38. Whether the surrender of some inures for the benefit of the rest?

When a certain city was besieged by Alexander, some of the inhabitants made surrender and opened the gates of the city to Alexander. Curtius says that Alexander spared the others as well, even the authors of the war, against whom by the Law of War he might justly have been incensed. And when, as Giovio relates, the people of Cortona were besieged by Vasto, a commander of the King of Spain, they surrendered even against the will of the commander of the garrison, the terms of the surrender, he says, excluding the garrison; yet Vasto released them, though deprived of their arms, on grounds of humanity, since they appeared to have made light of the strength of a powerful army.

Gentilis says that if, as often happens, there has been a general discussion and the besieged disagree as to the surrender of the town or as to the terms of surrender, a surrender made by the majority should be held to be made by all and should inure to the benefit of all, even of those who spoke and acted against the proposal to surrender; and further, though there has been no general discussion, yet if some who make the

surrender make terms on behalf of the others, the others too will be entitled to the benefit of the terms, just as one partner may contract on behalf of another, as Giovio says in another place, since they have a common interest, especially in a necessary matter and one of evident utility; although, if punishment were to be inflicted by the prince for the surrender being made, individuals who voted against it should be excused.

Gentilis, I, 17.

39. Whether one sent to treat about surrender is bound by terms made during his absence?

When the Prince of Orange on behalf of the King of Spain besieged Aversa in Italy, which the Marquis of Saluzzo, a general of the King of France, held with a garrison, Guido Rangone was sent by Saluzzo to Orange to negotiate a surrender on the best terms he could. Rangone being detained for a considerable time, and part of the wall having fallen under the perpetual cannonade, Saluzzo, worn out by the prayers of his soldiers and the tears of the people of Aversa, employed another suitable person and made a surrender to Orange at discretion. When Rangone heard of this, he protested that in fairness he was free and that he would not acknowledge terms the benefit of which he did not wish to enjoy. A debate was held before Vasto, another commander of the King of Spain, on the question whether Rangone should by the Law of War be treated as a prisoner; and Vasto, says Giovio, adopted the milder view on the question and set him free.

This view, Gentilis maintains, is also confirmed by law, provided that he was a man who up to that time had been able to protect the town or himself; because although the decision of a majority holds notwithstanding the opposition of a minority, yet a decision made in the absence of one person whose presence might have won over the others to his own view can not stand.

Gentilis, II, 17.

40. Whether a mistake in the execution of a surrender makes the surrender itself void?

Valerio Ursino had surrendered to the Spaniards on the condition that he should be conducted in safety to the French camp. The Spaniards afterwards maintained that he should be kept a prisoner, on the pretext that there was no French camp in existence at the time; but out of respect for his bravery, according to Giovio, they released him. Gentilis, however, maintains that justice also required his release, because the substance of the agreement was absolute, that he should not be a prisoner, not conditional on there being a French camp somewhere in existence. The mention of the camp was added to secure the safe performance of

the agreement, because Valerio would be safe in that camp; and words relating merely to performance do not affect the substance. Accordingly when the Ætolians surrendered and made a mistake in the wording of the terms of surrender, the Romans thought it fair that they should be restored to their former position.

Gentilis, II, 17; Giovio, book XXVI.

41. Whether one to whom a surrender is made may punish those who surrender as traitors?

When a garrison took and threw into chains their commandant, who refused to agree to a surrender, and then themselves made terms and surrendered to Solyman, he ordered the commandant to be treated with honor and the garrison to be all put to death. Giovio calls this a cruel butchery carried out at the command of a savage general. Others consider his action not only just but laudable, since the garrison were wrong in breaking the oath of service to their commandant. Still they had been given written guarantees of freedom; so that Solyman broke his own word in punishing the treachery of others. "What is our verdict?" says Gentilis. "Of that treachery the judge was not Solyman, but another. And yet we may say that Solyman, who knew nothing of their treachery when they fled to him in defiance of the commandant's authority, might treat them as deserters"; and he concludes, "This is my opinion."

Giovio, book XXVIII; Gentilis, II, 17.

42. Whether treaties or pledges of peace made by generals bind a prince or people?

Livy records that the Senate refused to ratify the agreement made by Sulpicius, a tribune of soldiers, with the Gauls as to their relinquishing a siege; and Sallust, in regard to the peace between Aulus, the general of the Roman army, and Jugurtha, King of the Numidians, says: "The Senate, as was indeed right, resolved that no treaty could be made without their own and the people's authority." A doubt arises, however, where the supreme authority knew of the matter, and kept silence. In such cases a distinction should be drawn between a pledge made conditionally on its being ratified by the supreme authority, for this condition avoids the pledge, and one made absolutely; and in the latter case if, without anything being said, acts follow which can not reasonably be referred to any other cause, the pledge will rightly be deemed to have been ratified; but if nothing follows except mere silence, there is no ratification. For without some act or thing, silence itself does not raise a sufficiently probable presumption of intention.

Ayala, I, 7, § 5; Gentilis, II, 10; Besold, on Peace, ch. 4, § 1; Grotius, II, 15, §§ 15, 16, etc.

43. Whether if the pledge of a general is disapproved by the supreme authority, those to whom it was given should be restored to their former position?

When the Senate was debating the Caudine peace, Spurius Postumius, one of the authors of the peace, on being asked his opinion, said:

"My opinion will be my witness whether I spared myself or the legions when I bound myself by this pledge, be it dishonorable or necessary. Yet, since it was made without their authority, the Roman people are not bound by it; nor is anything due to the Samnites thereby except our persons. Let the Fecials surrender us naked and bound, and let us absolve the people from any obligation we may have put upon them."

Other speakers, Lucius Livius and Quintus Melius, tribunes of the Plebs, argued that the people could not be absolved by the surrender of themselves, unless everything were restored to the Samnites as it had been at Caudium. And this was what Claudius Pontius, King of the Samnites, contended, when he refused to accept the surrender, saying:

"Let the Roman people, if they repent of the pledge given, restore the legions within the pass which hemmed them in; let them receive back the arms which they gave up under the agreement, and return to their camp."

Grotius says that the opinion of the tribunes and of Pontius seems to accord with equity; that of Postumius to have been approved in practice.

Livy, book IX; Grotius, II, 15, § 16.

44. Whether persons restored to freedom are bound to fulfil the agreements which they make as prisoners?

Francis, King of France, by the peace of Madrid promised the Emperor Charles on oath that when he reached the territory of his kingdom he would ratify the terms of peace. When, however, he came to the Parliament of Paris, he asked its advice, whereupon Selva, the President of the Parliament, in order to break the peace, using the authority of Cardinal Zabarella and the example of John, King of Cyprus, who did not keep his word given when he was taken prisoner by the Genoese, advised and convinced him that what was done under the influence of force and fear ought not to be held binding. Bodin expresses his surprise that the president of so great a Parliament did not blush to defend this opinion with arguments so foolish; since, in fact, it was inconsistent not only with the judgment of the Romans, Attilius Regulus and the consul Mancinus, but also with that of the French themselves, who allowed King John to return to England, on account of a pledge given to the King of England, when a prisoner, because he could not carry out what he had promised.

Bodin, V, last chapter; Hotman, Famous Questions, 7; Gentilis, II, 11.

45. Whether when it is agreed in a peace that what each possessed before the war is to be restored to him, the words must be understood to refer to the beginning of the war or its renewal?

In articles of peace between the Prince of Trent and the Venetians it was provided that each should hold what he held "before the last existing war." After the beginning of the war the Prince had seized a fort; and when the war was renewed after a truce, the fort was recovered by the Venetians. The question was raised whether by the peace the fort belonged to the Venetians. Alciati gave an opinion in favor of the Prince, on the ground that the "last existing war" appears to mean the war renewed after the truce. But Gentilis holds that his opinion was incorrect, because it was the same war, although hostilities were suspended by the truce, and so it was both "last" and "existing"; and he says that a thing renewed is not a new thing, but an old one begun anew.

Gentilis, II, 12; Grotius, III, 20, §§ 13, 21; Feschius, on Treaties, Thesis 21, at the end; question between the Emperor and the Venetians on the restoration of places; Azazio, Opinions, II, 13.

46. Whether when it is agreed that the places which were held in the war shall be held in the peace, villages and hamlets near to towns are included?

When the French held certain strongly garrisoned places in Piedmont, such as Casale and Turin, which were metropolitan cities, they agreed with the Imperialists and the Savoyards each to hold during a truce what they held during the war. Whereupon the French claimed to have the same right in villages and hamlets as in the towns, on the ground that the places were near to the towns, had been subject to them in the time of the war, and had contributed taxes and services. Pierino Belli said that in acquisition under the Law of Nations, a natural rather than a civil act ought to be considered; hence for possession an actual and complete apprehension is required, nor does the acquisition of a part not entered upon follow from the entry on or acquisition of another part; nor is occupation or transfer of possession acquired by the receipt of payments or taxation, because such acts affect persons rather than places, and acts which are indifferent and indiscriminate do not prove possession; nor is the right of ownership derived from subjects held against their will.

Belli, V, § 7; and authorities by him cited.

47. Whether when it is agreed in a peace to restore captured places, the restoration of a town which anciently belonged to the kingdom of the captor should be refused?

By the Treaty of Cateau-Cambresis, Calais, which had been captured by the French in the war with Philip, King of Spain, and Mary,

Queen of England, was to be restored after eight years. When it was not so restored, Thomas Smith was sent into France and formally demanded its return in the presence of the King. The King referred the matter to his councilors; and one of them, the chancellor Michael L'Hôpital, argued in this manner: The English might seek to recover even Paris by the same right as they sought Calais, for they won one as well as the other by war, and by war they lost both. The English pretended a new right to Calais; the right of the French was as old as the Kingdom itself. Although the English held it for two hundred and thirty years, more or less, yet the right to it was in the Kings of France, no less than was the right to the duchies of Aquitaine and Normandy, which the English long held by force of arms. Calais, like those duchies, the French had not acquired, but recovered, by war. Prescription had no place between princes, but right held good, and according to the Twelve Tables its validity against an enemy lasted forever. The English, in the late treaty of Troyes, did not even mention Calais, so that they appeared to acknowledge that they had abandoned their claim to it. There was indeed a clause as to the reservation of existing rights, but that referred only to minor matters; this of Calais must be regarded as of the first importance.

To this Smith replied that he had not expected so obsolete a right to Calais to be hunted up from the depths of antiquity; but now at last he saw that whatever the French had once got into their possession, whether by right or by wrong, they regarded as their own by right, as though in their eyes the only right were in arms, and it made no difference whether they possessed in good faith or bad. The French thought they held Calais by the right of "postliminium," whereas they really held it under agreement, and were resolved on no account to keep their pledged word for the restoration of Calais. In the Treaty of Troyes it had not been claimed because the eight years had not then expired. Here rising and turning to the French councilors he said:

"I appeal to the honor of you who were present when we urged that our right to Calais should be reserved in express terms, and you that it should be omitted because the time had not yet come, whether it was not then agreed between us that it should be reserved under that clause 'all other claims to remain safe and unaffected'?"

Camden, Annals, 1567.

48. Whether when it is agreed to restore goods or their value, it is sufficient, when goods which are in existence are claimed, to offer their value?

When the companies of English and Dutch merchants trading in the East Indies had inflicted great losses on one another by hostile attacks, it was at length agreed that each side should abstain from causing

injury and loss to the other; and that both ships and goods, or their value, taken from the time of the agreement being entered into down to its publication in those parts, should be restored on either side. In virtue of this agreement the merchants of the English Company claimed the restitution of certain goods which had been taken after the agreement was entered into, and conveyed to Holland. The representatives of the Dutch Company contended that restitution could not be claimed, except in the Indies, where the goods were taken; and not restitution of the goods themselves, but of their value at the time of capture. On the side of the English Company it was replied that when an agreement is for restitution simply, captured goods may be claimed wherever found, because it concerns the debtors, who are under obligation to pay, to specify times and places, otherwise the creditors have the right to exact payment anywhere and at any time. As to the question of value, it was a rule of the common law that goods actually in existence should be restored in specie; and in an agreement which contained no provision to the contrary, the same rule should be observed; since after the making of the agreement the capture of the goods was to be regarded as illegal and the property in them had not passed by any legal title from the original owners.

Digest, VI, 1, 10, 11, and 12; Digest, L, 16.

49. Whether compensation should be paid for goods which have perished by an accident preceded by negligence?

In the same agreement between the companies of English and Dutch merchants it was provided that ships captured by either side should be restored in the condition in which they were found in the possession of the captors, but neither party was to be bound to restore ships which had been lost, unless they were lost while in their service; and that goods which in fact had come into the hands of one side or the other should be subject to restitution. A Dutch ship, laden with a cargo, had been captured by the English and, after being some days in their possession, had been burned with its cargo through the fault or negligence of certain sailors; and the Dutch, under this agreement, claimed to be paid the price or value of the ship and cargo on the ground that the ship, being in the possession of the English, must be regarded as in their service and that a loss due to the fault of the English ought to fall on them, and not on the Dutch.

On the side of the English it was contended that the ship, though in their possession, was not in their service, nor did its loss arise out of service, which must be held to be the meaning of the agreement. Nor should a mere accident, due to the fault or negligence of sailors, be imputed to the company of English merchants, since they used the same care in securing the safety of this ship as of their own, and the same misfortune might have happened if the ship had remained in the possession of the Dutch.

Still less were they liable to restore the value of the goods, because the goods having been burned with the ship never in fact or effectively came into their hands. For, according to the definition of the jurists, a thing is to be deemed to have come into a person's hands "in fact," when he has been made richer thereby.

Digest, L, 17, 11; XVIII, 6, 71; L, 16; V, 3.

50. Whether those who have promised that a state shall be saved may destroy a city?

When the Carthaginians, after the Third Punic War, harried the allies of the Romans with war and invited the neighboring peoples to revolt, the Roman Senate discussed the question of destroying Carthage. A report of this having been published abroad, the Carthaginians sent ambassadors to Rome, who pleaded that a city, which had so glorious a history and was a monument of famous Roman victories, should not be destroyed. The consuls informed the ambassadors that if the Carthaginians remained loyal to the Senate and people of Rome and gave three hundred hostages and ships to the Roman people, the Carthaginian State should be saved and its people retain the same rights, privileges, and immunities as they had always previously enjoyed. The ambassadors, on receipt of this answer, returned home rejoicing. Soon afterwards Scipio Africanus the Younger was ordered to start at once with a fleet and to destroy the city with fire and sword. Scipio, according to his instructions, sent his lieutenant Censorinus, who, after receiving the hostages and ships, ordered the whole people to leave the city, giving them leave, however, to take with them whatever they wished and to found another city further away from the harbor. The Carthaginians, dumbfounded at the order of the general, appealed to the honor of the Senate and people of Rome; and the answer was that the Roman people had fulfilled their promise to the ambassadors, but that a state was not contained within the walls of a city.

So, too, Pompey, when he led away two hundred Senators and the better part of the citizens from a city which he had abandoned to Cæsar, said that the commonwealth did not consist in walls. The jurist Modestinus, however, says that if a plough is passed over a state, as it was over Carthage, the state ceases to exist; at any rate it is not the same as the state against whose destruction the ambassadors pleaded, and in the expectation of whose safety the Carthaginians handed over their hostages and ships.

And Gentilis says that although there is a distinction between a city and a state, because the buildings are the city, and the inhabitants are the state, yet any interpretation is perverse and strange which does not accord with the common understanding; nor can a state exist without a city, buildings, and walls, which constitute essential elements in it; and he

adds that in many of their actions in the Third Punic War the Romans can hardly be defended.

Livy, book XLV; Diodorus Siculus, book XLI; Digest, VII, 4, 21; Bodin, I, 6; Gentilis, II, 4; Grotius, II, 16, § 15.

51. Whether an agreement of peace may be broken under provocation?

Martius, an ambassador of the Romans, remonstrated with Perseus, King of Macedonia, who had renewed a treaty entered into with his father Philip, for having expelled Abripolis, a friend and ally of the Roman people, from his kingdom. Perseus replied:

" If it is so written in the treaty, that I may not defend myself and my Kingdom even if I am attacked, I must confess that I have broken the treaty in defending myself against Abripolis, the ally of the Roman people. But if the Law of Nations grants the right of repelling force by force, what, pray, ought I to have done when Abripolis devastated the territory of my Kingdom and carried off many free persons, a vast number of slaves, and many thousands of cattle? "

Grotius says: " A treaty of peace allows hostile action to be taken in the event of a new cause arising; and if such a cause can be reasonably alleged, it is better to believe that an injustice has been committed without perfidy, than with it."

And Thucydides says: " Peace is broken not by those who repel force by force, but by those who first resort to force."

Livy, book XLII; Grotius, III, 20, § 28; Gentilis, III, 24.

52. Whether the giving of hostages releases a man from his sworn word?

Bodin asserts that Francis, King of France, was released from the obligation of the Treaty of Madrid because he had given his sons as hostages. But hostages, says Ayala, like guarantors and securities, are added as accessory to a principal obligation, in order to make the adversary more secure; and so far are they from destroying the principal obligation that they can not exist without it. And so John, King of France, having been taken prisoner in battle by the English, and released on giving his word to return if certain agreements were not fulfilled, preferred to return to the enemy rather than break his word, though he had himself given his son as a hostage.

Bodin, V, last chapter; Ayala, I, 6, § 5; Gentilis, II, 11, at the end.

53. Whether a hostage may be detained after the death of him for whom the hostage was given?

Demetrius, who was a hostage at Rome for his brother Antiochus, on learning of his death came before the Senate and said that he had come as a hostage while his brother was alive, but now that he was dead he

knew not whose hostage he was; it was therefore only fair that he should be released to claim his kingdom, and that, as by the Law of Nations he had yielded to his elder brother, so now a minor should yield to himself as being the elder. When, however, he saw that the Senate did not mean to release him, having silently come to the conclusion that the kingdom would be safer in the hands of a minor than in those of Demetrius, he set out from the city under pretense of hunting, and came to Ostia, where he quietly embarked on a ship with a few companions of his flight.

Gentilis says that by civil laws a surety who has guaranteed that Titius will not do a certain act is released by the death of Titius; but that some persons draw a distinction between the words, " Titius, King of Syria, will not do it," in which case the surety is released by the death of Titius, and the words, " The King of Syria, Titius, will not do it," where the surety is not released; on the ground that in the former case, the words " King of Syria " are added to show who the Titius mentioned is, and in the latter the word " Titius " is added to show who is the present King of Syria. But he does not himself decide whether minute distinctions of this kind in the civil law have any application to questions of the Law of Nations such as the present. He holds, however, that a person is sometimes inserted in an agreement, not to make the agreement a personal one, but to show with whom the agreement is made, as when the matter concerns the successor as well; and conversely, even though a proper name is not used, yet the agreement may be a personal one, as when an arbiter makes an award against a king, upon whose death the agreement to submit to arbitration must be held to have lapsed.

Justin, book XXXIV; Gentilis, II, 19; Grotius, III, 20, § 57.

54. Whether those who have given hostages may receive them if they run away?

When the Romans had given hostages to Porsena, King of Etruria, as sureties for a treaty of peace, one of them, a maiden named Clælia, as it chanced that the camp of the Etruscans had been pitched not far from the bank of the Tiber, slipped through the sentinels leading a company of other maidens, swam the Tiber under the javelins of the enemy, and brought them all safe to their friends at Rome. When this became known to the King, he sent envoys to Rome to demand the hostage Clælia, saying that he cared little for the others, but declaring that if the hostage were not given up he would regard the treaty as broken. He added that if she were so given up, he would send her back unharmed to her friends.

On both sides, says Livy, honor was observed; the Romans returned the pledge of peace, as the treaty required, and the brave Clælia was not only kept safe, but honored by the Etruscan King; for he presented the maid with part of the hostages who had remained, and allowed her to

choose whom she wished. All being produced before her, she chose the children, thinking this choice beseemed a maiden, and that it was meet that the age which was exposed to the greatest harm should be released from the enemy.

Bodin says that it has always been lawful to kill hostages who run away, even though not so expressed in the agreement; and so the Tarentines who attempted to run away were brought back to Rome, beaten with rods, and flung from the Rock.

Gentilis agrees that this is the law, because hostages are not prisoners who have a right to run away; for hostages are given under an agreement, which they have no right to break. Grotius, however, says it is clear that a hostage has no right to run away, if he has given his word, either at first or later, in order to secure easier confinement; otherwise the intention of the state does not appear to have been to bind its citizen not to escape, but to give the enemy power to guard him as they please; and so he says that Clælia's action may be defended.

Gentilis and Grotius, however, both conclude that the state which gave the hostage ought not to receive him back and keep him, any more than one may receive back a thing given in pledge without being guilty of theft; and so Edward the Third, King of England, justly accused the King of France of having illegally received a hostage who ran away.

Livy, book II; Gentilis, II, 19; Grotius, II, 20, § 54.

SECTION X.

Of Questions of Wrong between Belligerents.

Questions of Wrong between Belligerents are those in which it is asked whether the rules of war have been observed in the commencement and prosecution of a war, and also in the execution after a victory won.

1. Whether war may ever be commenced without a declaration?

When Gustavus Adolphus, King of Sweden, invaded Germany with an army, the Emperor Ferdinand the Second sent a letter to him in which he said that he was very much surprised that he had invaded the Roman Empire with such a vast army and had raised such huge contingents without declaring war. To which the King replied that he would not have thought it possible that the past should so soon be forgotten by the Emperor. It was a notorious fact, of which all the world was aware, that the commander of the Emperor's troops, without any declaration of war, had led a fresh and powerful army, under the standards of the Eagles, into Prussia; so that he failed to see on what pretext a declaration of war, which the Emperor had himself forgotten, was required from himself, fighting as he was not on the offensive, but on the defensive; or how he could accuse him of acting against the laws of all nations. Those laws did not require an unjust attack made on a person to be repelled merely by heralds, when nature and the very circumstances allowed every man the use of arms for safety in such a case. Nor yet had he altogether omitted a declaration of war; on the contrary he had been particularly careful that no one should be able to complain that he had been attacked and beaten by surprise. In two letters which he had sent to the Electors, and in a message delivered by one of his Privy Councilors to the Emperor's general, he had expressly stated that if amends were not made for the wrong inflicted on him he would at length, after his most just complaints, have recourse to another method of defending himself and his dignity.

On this question the jurists lay down the following rules: As a citation may sometimes be omitted in a civil case, so in war a declaration may sometimes be omitted for just cause; for instance: (1) when war is undertaken on grounds of necessary defense; (2) when war is made on those who are already regarded as enemies; (3) when arms are taken up against rebels and deserters, because with them the Law of Nations is not observed; thus the Romans did not declare war against the people of

Campania and Fidenæ who were deserters; (4) the Fecials lay down a rule that there is no need to make a renunciation of friendship when property is not restored to ambassadors seeking restitution, nor any other form of satisfaction given.

So, too, in Dio, Cæsar argues in favor of commencing a war against Ariovistus without a decree of the Senate and people; for, he says, wars occur for which men may be prepared, and which are preceded by complaints and declarations; but others arise which can not be made the subjects of discussion, because they are inevitable.

Arlanibaeus, Swedish Arms, p. 54; Gentilis, II, 2.

2. Whether war may be commenced at once after a declaration?

Pierino Belli frankly confesses that he has nowhere found the number of days fixed for commencing war after a declaration. He says, however, that by natural reason it is fair that some time should intervene in which a belligerent may fortify and prepare himself for defense; otherwise one who declares and commences a war practically at the same moment may be accused of bad faith; although one who has given cause for declaring war against himself ought to show himself prepared, especially if the cause is recent, grave, and inexcusable.

Gentilis states that after a declaration there is usually an interval of three and thirty days before hostilities are begun; and perhaps the mention of three days is derived from an Imperial Constitution recorded in Guido Papa; and he says that Cyrus acted wrongly when he commenced and declared a war against the Armenian King at the same time; and the Romans when they declared and commenced the Third Punic War at the same moment; and so he says that a certain bishop rightly told Chosroes, King of the Persians, that he acted unworthily in giving Justinian no time for deliberation, and compelling him either to agree on a peace or to engage in war immediately on its declaration.

Grotius, however, maintains that by the Law of Nations no interval is required after a declaration, and he does not blame Cyrus or the Romans; though he admits that it may happen that natural reason requires some time to intervene, according to the character of the dispute; for instance, when restitution has been demanded or the punishment of an offender required, and there has been no refusal; for in such cases time ought to be allowed in which the demand may conveniently be complied with.

Belli, II, § 9; Gentilis, II, 1, at the end; Grotius, III, 3, § 13.

3. Whether fraud may be employed in war?

When Darius had been long besieging Babylon and was greatly troubled at finding the storming of the city so difficult, Zopyrus caused his nose, lips, and ears to be cut off, and set forth to Babylon under the

guise of a deserter. He showed the people his mutilated body, complaining of the cruelty of Darius, and begged them to allow him, his anger being more recent than theirs, to join them in the war. All knew his nobility and his courage, and none distrusted the good faith of one who offered them the wounds of his body as pledges. Accordingly he was appointed a general by a unanimous vote, and having received a small command, he won victories over the Persians, who time after time took care to retreat before him; until at last, the whole army being intrusted to him, he betrayed it to the King and delivered the city into his hands.

Livy, however, says that those who mutilate their own bodies as Zopyrus did are rather notable than honorable, and that frauds of desertion are devices unworthy of Romans; and Messala was somewhat afraid that the thing was not quite honorable when Menedorus, who was about to betray Pompey's fleet, asked that for a time he might be allowed to harass that of Cæsar.

Polybius, however, asserts that force counts for less in war than opportunity and fraud; and Ammianus says that all successful issues of wars are applauded without distinction between valor and fraud; and the jurists call that a " good " fraud which is contrived against an enemy. Gentilis, after reviewing the authorities on the other side, comes to a conclusion which may appear strange, and says: " In my opinion both those who desert and those who send deserters act justly." Grotius brings under this head the action of those who use the enemy's arms, standards, clothes, or sails; for all these are things which any one may employ at will.

Justin, book I, at the end; Gentilis, II, 2; Grotius, III, 1, § 6 and following sections.

4. Whether falsehood may be used to enemies?

When Themistocles was afraid that after the naval victory of the Athenians, Xerxes might still stay in Greece and involve the Greeks in new difficulties, he pretended friendship and advised Xerxes to hasten to leave Greece before the Greeks cut off his retreat; and although Ventidius recognized the Parthian spies who pretended to be deserters to him, he treated them courteously like friends and allowed himself to be overheard by them to say that he intended to take a certain course, when he was really meditating a different course, in order that they might inform the Parthians of what they had heard as being his plans, and the Parthians might make their preparations accord to the report received, and so be caught unprepared at the point where he had determined to attack them. Both used false speaking or lies; Themistocles lied to the enemy, and Ventidius to others in order to deceive the enemy.

Augustine, however, denies that a lie is ever just, even though an enemy, who may justly be deceived by other means, is deceived by it.

But to the rule about not lying, an exception in the words " except to enemies " is added by Plato, Xenophon, Philo among Jews, Chrysostom among Christians, and practically all the theologians except Augustine; and of this Gentilis and Grotius also approve. They add, however, a proviso that what is said about falsehood is to be referred to assertions, not to promises; for a promise confers a right on him to whom the promise is made, and this holds good even between enemies.

Plutarch, Themistocles; Dio, book 49; Gentilis, II, 5; Grotius, III, 1, §§ 17, 18.

5. Whether enemies may be destroyed by poison?

When Perseus arranged with a certain native of Tarentum that he should destroy the Romans by poison, Livy says that he did not wage just war, like a king, but attacked them by the secret crimes of robbers and poisoners. Baldus, however, says that to kill an enemy by poison is lawful, according to the teaching of Vegetius, and that it is permitted to use forbidden weapons for defense, since nothing is culpable in the way of defense. Gentilis doubts the authority of Vegetius and says that if he does record any such opinion he probably does so in treating of unlawful stratagems. And he says that it is manifestly false to say that in defensive war anything is allowed, because a defense ought to be blameless. He quotes to the contrary the authority of Lucius Florus, who, when Aquilius finished the remains of the Asiatic war by putting poison in the wells in order to secure the surrender of certain cities, writes that if his action brought an early victory it certainly brought an infamous one; inasmuch as, in defiance of divine law and ancestral custom, he had stained the hitherto unsullied arms of Rome by the use of foul poisons. He also charges with this crime the Spaniards, who, when besieged in Naples by the French, went out at night and poisoned the enemy's wells; and who, well knowing the disease formerly called Neapolitan, but afterwards French, and how contagious it was, secretly sent prostitutes, and those the most beautiful, out of the city, to infect the French army.

Grotius, however, holds that we must not extend this condemnation to merely fouling waters so as to make them undrinkable, without the use of poison; for we must regard that as the same thing as diverting a river or intercepting the channels of a spring, which is lawful both by natural law and by the consent of nations.

Gentilis, II, 4; Grotius, III, 4, § 15.

6. Whether an enemy may be killed by sending an assassin against him?

When Porsena, King of the Etruscans, desiring to restore the Tarquins to Rome, was guarding the approaches to the city, Mucius

Scævola by stealth approached the King in his own camp. There as it chanced that the soldiers were receiving their pay, and a clerk sitting with the King in practically the same dress was busied about his work, and the soldiers thronged about him, Mucius killed the clerk in mistake for the King; and when he was arrested, the blow having missed the royal person, he thrust his hand into a blazing fire, and by a ruse doubled their terror; "This will show you," he said, "what a man he is whose blow you have escaped; there are three hundred of us who have sworn the same oath"; whereupon the King, filled with terror, declared that the Romans should be free.

Of this deed Seneca says that he might have done a luckier deed in that camp but not a braver one. Another Roman pretending in a battle that he was one of Mithridates' soldiers, came close up to the King, as though wishing to say something to him, and wounded him; and Gentilis recites many more instances of the same kind. He does not, however, approve of them, but holds that the complaint of Alexander the Great, about the murder of his father procured by Darius, was just: "Though you have arms, you buy the lives of enemies at a price." And he approves the action of Alexander in avenging by a terrible punishment the treacherous murder of this same Darius.

Grotius has a different opinion about Scævola's action, in which Porsena himself saw nothing but valor. He makes a distinction, however, between those who, in making such attempts, are not bound by any tie of allegiance such as unites subjects to their king, vassals to their lord, or soldiers to him whom they serve; and assassins, whose deed is attended by perfidy, whom, he says, we should regard differently; for not only do they themselves act contrary to the Law of Nations, but also those who use their services.

Gentilis, II, 8; Grotius, III, 4, § 18.

7. *Whether the superstition of enemies may be used to their hurt?*

Philip, King of Macedon, crowned with laurel his soldiers when they were about to fight against the Phocians, because the Phocians had despoiled the temple of Apollo, and so would be terrified at the sight of that god's own leaf. The device succeeded, for they at once turned their backs, were cut down, and gave the King a bloodless victory. In the same way an impregnable town in Epirus is said to have been taken, through a traitor in it sinking a dog in the only well which gave drinking-water, because the soldiers of the garrison were imbued with the Greek superstition and declared that they would rather die at once than die from the contaminated water.

Gentilis says there is no reason why advantage should not be taken of the superstition of enemies. But in cock-fighting, when a cock has

been infected with garlic in order that the smell may make the other cock seem to be beaten from the arena, the umpires usually wring its neck; and by the laws of the duel, which especially look to bravery and honor, it is considered scandalous for a combatant secretly to wear a tunic of mail under his outer garment in order that the blows of his adversary may be rendered idle and vain.

Gentilis, II, 2; Zonaras, vol. II; Scanderbegus, V.

8. Whether the right of retaliation has a place between enemies?

When a large Carthaginian fleet was defeated near Sicily, and its commanders, broken in spirit, were discussing proposals to sue for peace, Hamilcar said he dared not go to the consuls lest he should be cast into chains in the same manner as the consul Cornelius Asina had been by themselves. Hanno, however, who read the Roman character more truly, considered that no such fate need be feared and went to confer with them with complete confidence. When he was discussing the ending of the war, a tribune of soldiers said that he deserved to be treated as Cornelius Asina had been; but both the consuls bade the tribune hold his peace and said: "The honor of Rome relieves you of that fear, Hanno." "Famous men they were," says Valerius Maximus, "to have the power to put so mighty an enemy in chains; far more famous to have refused to do so."

Gentilis, however, appears to defend the right of retaliation between enemies as lawful, and says the Romans were right in flogging to death or beheading prisoners because Roman prisoners had been slain by the enemy; and also in handing over the noblest Carthaginian prisoners to the sons of Regulus to butcher and destroy in revenge for their father, who was put to death at Carthage in the most barbarous manner. He also records that Spaniards were shamefully treated, and even hanged, by a Florentine, because Florentines in another place had been ill-treated by Spaniards.

Giovio refers to this and declares that it is not to the point here to say that the prisoners are not the persons who acted with cruelty, and therefore they should not be treated with cruelty; for an army is one body, the enemy are one body, and those who make war on one side are one body. Grotius, on the other hand, says that nature does not allow retaliation except against the actual offenders, nor is it enough that by a kind of fiction you regard the enemy as forming one body; because individuals who did not consent to the wrong should not be punished for the offense of the general body; and in the same way Plutarch accuses the Syracusans for having put to death the wives and children of Hicetas, merely because Hicetas had killed the wife, sister, and son of Dion.

Valerius Maximus, VI, 6; Gentilis, II, 18; Grotius, III, 11, § 16; II, 21, § 18.

9. Whether those who give trouble to an enemy by a useless defense may be treated without mercy when they surrender?

Henry the Second, King of France, after the capture of Bouvines, ordered certain too obstinate persons to be hanged, on the ground that they had attempted, in defiance of the rules of warfare, to hold against the royal forces a weak position which they could not possibly defend. And Giovio relates that certain persons who had surrendered at the victor's discretion met a shameful death for having stubbornly tried to hold an unfortified position. A Neapolitan, however, said in answer to Belisarius that no one should regard obstinate zeal as worthy of punishment in any man. Moreover, it must be remembered that a man can not desert his allotted post or leave his station or garrison, without the most certain danger of his life. Gentilis says that soldiers who are obstinate in such circumstances may be excused, but certainly can not be acquitted of all blame, because they were not bound to attempt the impossible; nor need it be considered that a soldier fears ill from his own prince, since the injustice of another ought not to prejudice an enemy.

Gentilis, II, 16; Grotius, III, 4, § 13.

10. Whether those who, while treating of surrender, prepare fortifications and engage in hostilities in the interval, may be treated with greater severity?

When Ferdinand recovered Reggio by force, all the French were hurled from the walls, because, in order to complete the fortifications which they had begun, they had made pretended overtures for surrender and had fooled the King for a long time by frequent conferences, and had even killed some of his men before the walls with artillery. Gentilis says that those who have entirely concluded an agreement for surrender and not carried it out may sometimes be deservedly treated without mercy, as when the garrison of Perpignan had agreed to surrender the place to the French King within three days, and then appealed for aid to their own side who were bringing relief, and the King hearing of it and perceiving that the request for three days was a mere trick, made a violent attack on the town, stormed it, and put to the sword both women and children. But as in this case there was no actual agreement about surrender, Ferdinand, he says, had no right to punish the French as he did, since mere overtures have no binding force; nor is there anything to forbid a man making a pretense and using deceit to serve his own cause. Some allowance might be made for the killing of the soldiers unawares, but even this ought not to excuse Ferdinand. For what were they doing by the walls? If there was no perfidy, there was no excuse for the use of cruelty.

Gentilis, II, 18.

11. Whether a faithless and fickle enemy who surrenders may be treated with greater severity?

When the inhabitants of Capsa had surrendered to Marius, Sallust relates that their town was burned, the grown men killed, the other inhabitants sold, and the loot divided among the soldiers. This crime against the law of war, he says, was not committed from greed or guilt on the part of the consul, but because the place was a convenient one for Jugurtha, and difficult of access to the Romans; and its inhabitants were a fickle and faithless people, restrained in the past neither by favor nor fear.

Gentilis says the act was contrary to the ordinary laws of war, but may be justified as an exceptional and extraordinary case. In the same way, he says, Cæsar did not spare either the Numidians or Juba when they surrendered, and on some occasions treated the Gauls without mercy, in order to burn the mark of a terrible example into a race fickle in all its counsels.

Gentilis, II, 18.

12. Whether prisoners who can not be guarded may be put to death?

In that famous battle fought at Agincourt under the command of King Henry the Fifth, in which the English overthrew the French power, the victors being outnumbered by their own prisoners, and fearing a nocturnal attack, chose out those of noble rank and butchered the rest. History calls this an inhuman act; nor was the battle so bloody as the victory.

Gentilis says he can not approve. He commends the Scots, however, who although threatened by the gravest danger, did not kill their prisoners; and the French general who, in order to relieve his camp of a multitude of prisoners, generously released them all. He asks, however, whether there may not be exceptional reasons for which prisoners may be put to death, and mentions that Hannibal, when surrounded by Fabius, in order to guard against a rising of the prisoners at a moment of danger, killed them all to the number of five thousand; and that Brutus slew his prisoners when he was about to advance into battle, because he could neither trust nor guard them.

Gentilis, II, 16.

13. Whether those who are twice captured should be spared?

Ligarius, taken prisoner by Cæsar, in order to secure his release, gave his word that he would in future take no action against him; but having failed to keep it and having fallen a second time into Cæsar's hands, he was put to death for ingratitude and perfidy. Cæsar also put to death many others whom he had taken prisoners a second time, accounting it folly to save those who opposed him more than once. How-

ever, says Gentilis, this practice applies chiefly to mercenaries; for there is no reason that a citizen should be treated with special severity, even if he is taken a prisoner a thousand times; for no one can be bound not to defend his country or not to obey his prince.

Gentilis, II, 18.

14. [13] *Whether hostages may be killed for the fault of those by whom they were given?*

The Thracians once put to death two hundred and fifty hostages, and the Romans three hundred Volsci and Aurunci; but Narses, a good general, thought it monstrous to punish innocent hostages; and Scipio said his wrath should fall not on innocent hostages, but on the actual defaulters, and he would exact satisfaction not from an unarmed but from an armed enemy. If, however, the man who has come as a hostage is, or was before, among the delinquents, or if, after giving his word, he has broken it in a great matter, it may be that to punish him is not a wrong. This is the view of Grotius.

Gentilis, however, says that even if they have been guilty of no offense, it is both just and expedient that hostages should be punished; for so honor, the most precious thing in the world, is vindicated, and the Law of War scrupulously kept; his argument being that the punishment arises from agreement, and is therefore as just as if it arose from actual fault or offense. Grotius says that it was so held only when it was commonly believed that a man had the same right over his own life as over other things, and that that right had passed by consent, tacit or express, to the state. But when it came to be recognized that the ownership of life was reserved to God, it was believed that no one could by compact or agreement give another a right over the life either of himself or of his fellow-citizen.

Gentilis, II, 19; Grotius, III, 4, § 14; 11, § 18.

15. Whether women and children conquered in war may be dealt with without mercy?

Thucydides relates that the Thracians, after the capture of Mycalessus, killed even the women and children; Arrian tells of the same conduct by the Macedonians when they captured Thebes; and Germanicus Cæsar, as Tacitus records, spared neither sex nor age when he wasted the villages of the Marsi, who were a people of Germany.

Grypus, however, in Justin, says that none of his ancestors in all their wars, domestic and foreign, ever dealt cruelly after a victory with women, whose very sex exempts them both from the dangers of war and from the cruelty of conquerors. The examples to the contrary are referred either to the avenging of a serious disaster to the victor's own side, or the punishing of serious offenses.

Gentilis, II, 21; Grotius, III, 4, § 9; 10, § 10.

16. Whether armed women who do the work of men should be spared?

The Emperor Aurelian killed many women whom he took fighting in the dress of men, and led others in his triumphal procession. Gentilis says that no mercy should be shown to Amazons, such as were Artemisia, Zenobia, and Victoria, who was called the "mother of the camp," nor to those furies who met Suetonius Paulinus in the Isle of Man, any more than to a man. But the Spartans refrained from attacking Argos, because there were women in the defense, whom they thought it shameful to injure.

Gentilis gives it as his opinion that in so far as they play the part of men, they are not women; otherwise it would be an easy matter to protect any position against enemies by placing women as its guardians and defenders; and he says the real reason why the Spartans refrained from the attack was that it would have been shameful to be driven back by women, which was what they feared.

Gentilis, II, 21.

17. Whether rape may be committed on women conquered in war?

After the capture of Thebes by Alexander a certain Thracian general ravished Timoclea, a noble Theban lady; and when afterwards he demanded money of her, she led him apart to a well in which she had told him that the more precious of her possessions were concealed, and as he leaned over the mouth of the well to look, pushed him down, and crushed him by throwing stones on the top of him. Brought to Alexander in chains for this crime, he asked her who she was; to which she replied fearlessly, "I am the sister of Theagenes, who was chosen general against Philip, and fell fighting bravely for the liberty of Greece." The King, admiring her nobility and steadfastness, released her with her sons, thinking perhaps, too, that the general had deserved his fate. Certainly Marcellus seems to have disapproved of the rape of women, for it is said that before capturing Syracuse he took measures to prevent their honor being violated; and Ælian after relating that the victorious Sicyonians violated the women and girls of Pellene exclaims, "By the Gods of Greece this is a cruel thing to do, and, as far as I remember, it is condemned even by barbarians."

And "although there are many examples to the contrary, it is absurd," says Gentilis, speaking of Bodin, "to ascribe to the justice of war the unjust acts which are committed in war"; nor does he in this case allow retaliation.

Grotius, however, says, "Some have allowed the rape of women, regarding it only as an injury to an enemy's person, to which they thought it not improper that everything belonging to the enemy should be exposed. Others have not allowed an act of unbridled lust which

ought no more to be unpunished in war than in peace; and this," he says, "is the Law of Nations, not of all nations, but of the better among them."

Curtius, book II; Gentilis, II, 21; Grotius, III, 4, § 19.

18. Whether priests taken in war may be treated with greater severity?

Richard the First, King of England, put Philip, Bishop of Beauvais, whom he took prisoner in war, into prison and chains. The Bishop wrote and complained bitterly of this treatment to the Roman Pope, and the Pope in a letter to the King earnestly begged him not to detain longer his dear son, a sacred person and a shepherd of the Lord's flock. Whereupon the King sent an ambassador to the Pope, and bade him show the Pope the arms in which the Bishop had been taken, and address him in the words of the sons of Jacob to their father, asking for their absent brother: "This have we found; know now whether it be thy son's coat or no." To which the Pope replied: "This is indeed not the coat of my son, nor of my brother, but of some child of Mars; and for aught I care, let him appeal to Mars, if he will, to intercede for his freedom."

Plutarch, however, relates that the Cretans, when involved in civil wars, refrained from all injury to priests; and the Goths are praised by Procopius for sparing the priests of St. Peter and St. Paul without the City. Gentilis, however, says that the rule which he gave for women should also be observed in the case of priests, namely, that if they bear arms they need not be spared. Nor does he hold them exempt from the hazards of war, even if they do not bear arms, if they engage in expeditions and hostile operations and excite and encourage their soldiers against the enemy by harangues or words. In support of this he quotes Æsop's fable about the trumpeter who marched with an army, and on its defeat, falling into the hands of the enemy, begged them not lightly and unjustly to kill him, because he had killed none of them and had not even fought, and carried nothing but a trumpet; to which the enemy replied that that was all the more reason why he should die, because though he could not fight himself, he roused others to the fight. Nevertheless, says Gentilis, such servants of war should be treated somewhat leniently.

Camden, Remains; Gentilis, II, 22; Grotius, III, 10, § 10.

19. Whether things sacred and religious may be violated in war?

When Titus was besieging Jerusalem, he consulted his principal generals as to the fate of the Temple. Some of them were in favor of exercising the right of war and sparing nothing; others thought that he should abstain from violating the Temple unless the Jews fought from it, in which case it should be considered not as a Temple but as a fort.

Titus, however, although the Jews occupied the Temple and defended themselves there, declared that he would not take vengeance on inanimate things instead of men and would not burn so mighty a monument, the destruction of which would be a loss, the preservation an ornament to the Romans. And the fact that it was afterwards burned was due to the obstinacy of the priests and the Jews, who refused to leave it, and to the fury of the soldiers whom Titus was unable to restrain.

The jurist Pomponius says that all places when captured by an enemy cease to be sacred, and he also says " the tombs of enemies are not objects of religion to us, and therefore we may remove the stones from them and turn them to any use we please."

Thucydides, however, says that it was law among the Greeks that any who made a hostile attack should abstain from the sacred places; and Livy says that when Alba was destroyed by the Romans the temples of the Gods were spared. Gentilis approves of not sparing even temples in certain cases, namely: (1) if they are converted to warlike uses; and so, when the Genoese occupied and fortified a temple at Acre, the Venetians did not spare a fane which the enemy had already profaned; (2) when like is paid for like; and so if the Greeks set fire to the temple of Cybele at the burning of Sardis, then the Persians were justified on this ground in afterwards burning temples in Greece. Grotius, however, defines the position by saying that although the mere Law of Nations does not except sacred things and allows religious places to be violated with impunity, yet they can not be violated without contempt of Religion, and the highest reason of all is that which regards Religion.

Zonaras; Gentilis, II, 22; Grotius, III, 5, §§ 2, 3; 12, § 6.

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